No. 57

In The

Supreme Court of the United States

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant

vs.

I. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona, and THE INDUSTRIAL COMMISSION OF ARIZONA;

and

PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY, UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING REFINING AND MINING COMPANY; INTERNATIONAL SMELTING AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO.; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

JURISDICTIONAL STATEMENT

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Plaintiff-Appellant,

vs.

B. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona; and THE INDUSTRIAL COMMISSION OF ARIZONA;

and

PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY; UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING, REFINING AND MINING COMPANY; INTERNATIONAL SMELTING AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO.; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees.

No. .....

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARIZONA

JURISDICTIONAL STATEMENT

Appellant, as one of some 13,000 "general policyholders" of the Industrial Commission of Arizona (the "Commission"), appeals from a judgment of the Arizona Supreme Court entered on rehearing refusing to consider appellant's properly raised constitutional objections to action taken by the Commission in providing Workmen's Compensation Act and Employers' Liability Act insurance coverage to an arbitrarily constituted class of 34 policyholders called "self-raters" at discriminatory and unreasonably low rates, to the damage and detriment of appellant and the other general policyholders. The Arizona court refused to consider the constitutional questions and to permit appellant to present evidence thereon on the basis of an estoppel theory (18a)[1] directly contrary to decisions of the United States Supreme Court.[2] The effect of the judgment appealed from is to sustain the constitutionality of ARIZONA REVISED STATUTES ("ARS") § 23-983(E) as construed by the Arizona Supreme Court and applied by the Commission.

OPINIONS BELOW

The Superior Court of Maricopa County dismissed, principally on procedural grounds, all three causes of action of the amended complaint in Cause No. 81797 and all four causes of action of the complaint in Cause No. 86889, except for a part of the Fourth Cause of Action as against the Commission (1a, 16a, 20a-39a).

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[1] Except as otherwise indicated, numbers in parentheses refer to pages of Appellant's Abstract of Record for the Arizona Supreme Court. Numbers in parentheses followed by the letter "a" refer to pages of the Appendices to this Jurisdictional Statement.

Appellant's Memorandum in Support of Motion and Amended Motion for Rehearing is cited as "App. Mem."

[2] E.g., *International Steel & Iron Co.* v. *National Surety Co.*, 297 U.S. 657 (1936) discussed at p. 22 *infra*.

The Arizona Supreme Court affirmed the dismissals below, not on procedural grounds but on the merits, holding that the causes of action were legally insufficient on their face (15a).

On rehearing, the Supreme Court adhered to its original decision, notwithstanding appellant's Federal constitutional objections (19a).[3]

The opinions of the Supreme Court, original and on rehearing, are reported at 86 Ariz. 180, 342 P. 2d 854 (1959) and 87 Ariz. 201, 349 P. 2d 771 (1960) and are reprinted as Appendices A and B. The opinions of the Superior Court are reprinted as Appendices C and D. The judgments appealed from are reprinted as Appendix E.

JURISDICTION

The decision of the Arizona Supreme Court on rehearing was rendered on March 2, 1960 (37a). On May 27, 1960 Notice of Appeal to this Court was filed with the Arizona Supreme Court.

Jurisdiction is based on 28 U. S. C. § 1257(2); *Morey* v. *Doud*, 354 U. S. 457 (1957); *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934); *Missouri ex rel Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313 (1930); *Young* v. *Ragen*, 337 U. S. 235 (1949) and *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946).

STATUTE INVOLVED

This appeal involves the constitutionality of ARS § 23-983(E), the text of which is as follows:

[3]In its original decision the court mistakenly asserted that appellant's Fourth Cause of Action in No. 86889 was not dismissed against the self-raters. In fact, it was dismissed against the self-raters but not dismissed against the Commission. The court corrected this error on rehearing (1a, 16a).

"The commission may in its discretion endorse on any of its regularly issued policies a self-rating plan, and may apply tentative rates, subject to modification in accordance with the loss experience of such risks, and shall provide for a carrying charge, premium tax and a rate for creation of a catastrophe reserve and reserves to meet anticipated and unexpected losses to be fixed by the commission."

Section 23-983 is reprinted in full as Appendix F.

QUESTIONS PRESENTED

Does ARS § 23-983(E), as construed by the Arizona Supreme Court and as applied by the Commission, violate the Fourteenth Amendment by depriving the general policyholders, including appellant, of equal protection of the laws and of property without due process of law, in that an arbitrarily and unreasonably constituted class of insureds called self-raters:

(a) have received and do receive Workmen's Compensation Act insurance coverage from Reserves created with payments made by general policyholders and self-raters at rates which are grossly and unreasonably discriminatory in favor of the self-raters;

(b) have paid and do pay rates which are grossly and unreasonably lower than the rate paid by the general policyholders for administrative expenses of the Commission;

(c) have received and do receive without any consideration additional Employers' Liability Act insurance coverage which the general policyholders must pay for and which, to a certain extent, the general policyholders cannot obtain at all?

STATEMENT OF THE CASE

Appellant alleged that the Commission arbitrarily and unreasonably discriminated in favor of the self-raters and against the general policyholders in its administration of the State Compensation Fund by (1) giving the self-raters the privilege of using a more beneficial formula for computation of their contributions to certain Reserves and administrative expenses, (2) requiring the general policyholders to bear the entire burden of building up Reserves which provide equal coverage for self-raters and general policyholders and (3) furnishing self-raters additional and unlimited Employers' Liability Act coverage the expense of which is borne entirely by the general policyholders (42-44, 46, 53, 58-63, 65-66, 77-80, 137-39, 257-58, 260-61, 264-68, App. Mem. p. 31-38).

Where, as here, the appeal is from a state court decision dismissing the complaint, all factual allegations of the complaint are accepted as true.[4]

I. Facts

A. Workmen's Compensation Act Insurance

1. *The State Compensation Fund*

Under ARS § 23-961(A) an employer must cover his Workmen's Compensation Act liability either by insuring with the State Compensation Fund, or insuring with certain licensed private carriers,[5] or self-insuring upon satisfying the Commission of financial ability (2a).

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[4] *Postal Telegraph-Cable Co. v. City of Newport*, 247 U. S. 464, 474 (1918).

[5] This alternative does not really exist since the cost of private insurance in Arizona is fixed by the Commission at ten percent in excess of the cost of insuring with the State Compensation Fund. Brief Amicus Curiae in the Supreme Court p. 3. Ninety-five percent of Arizona employers have insured with the State Compensation Fund. ANDREWS, PROGRESS OF STATE INSURANCE FUNDS UNDER WORKMEN'S COMPENSATION 5 (U. S. Dept. of Labor, Div. Labor Standards Bull. No. 30, 1939).

From the Compensation Fund are paid:

(a) all Workmen's Compensation Act benefits except losses from one accident above the Excess Loss Limit then in force.[6] (Hereafter, losses below the Excess Loss Limit are referred to as "primary losses" and losses above the Excess Loss Limit are referred to as "catastrophe losses.");

(b) basic costs, consisting of (i) annual contributions to the Catastrophe Reserve out of which are paid catastrophe losses; (ii) annual contributions to the Reserve for Anticipated and Unexpected Losses out of which are paid benefits on reopened claims; (iii) administrative expenses of the Commission; and

(c) dividends to the general policyholders (7, 9-11, 377, 2a).

General policyholders and self-raters receive equal coverage from the Catastrophe Reserve (9-11).

2. *Premiums of General Policyholders and Self-Raters*

The Commission, acting under ARS § 23-983, has issued a General Class Policy to approximately 13,000 employers and a Self-Rating Policy to 34 employers. The Self-Rating Policy is the General Class Policy modified by the Self-Rating Endorsement (6, 13-13d, 17-20, App. Mem. p. 1, 2a).

The Commission sets manual premium rates in terms of dollars per $100 of payroll for all job classifications. Premiums of the general policyholders have always been the manual premium rates. A part of the premium, called "pure premium component" (sometimes referred to here-

[6] For example, during 1952-53, the Excess Loss Limit was $17,500 (23c).

after as "the premium for primary losses"), is to cover expected primary losses of the insureds and is based to some extent upon recent national and local loss experience for each job classification (4a-5a, 14-16).[7] To this pure premium component is added a loading factor for basic costs. The loading factor, formulated in terms of a percentage of the total premium, is in reality a percentage of the pure premium component (14-17). During 1948-53 the general policyholders' loading factor for basic costs was set by the Commission at .2632 of the total premium, i.e., .3572 of the pure premium component. The components of the .2632 loading factor were as follows (23-24):

For Adminstrative Expense	.0931
For Catastrophe Reserve	.1371
For Reserve for Anticipated and Unexpected Losses	.0330
	.2632

In accordance with its construction of ARS § 23-983(E) and the Self-Rating Policy issued thereunder (contested by the appellants in the courts below but adopted by the Arizona Supreme Court), the Commission established a Self-Rating Plan[8] which sets forth the formula for computing the charges to the self-raters for Workmen's Compensation Act insurance. Under this formula, the Commission sets as the initial or tentative rate for a self-rater

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[7] See INDUSTRIAL COMMISSION OF ARIZONA & NATIONAL COUNCIL ON COMPENSATION INSURANCE, WORKMEN'S COMPENSATION AND EMPLOYERS' LIABILITY INSURANCE MANUAL (ARIZONA).

[8] The formal title of which is "Outline of the Experience Rating Plan of the Industrial Commission of Arizona Applicable to Employers Insuring with the Commission on a Self-Rating Basis" (219-27).

in a given year the average of its ultimate rates for the preceding four years. The self-rater's ultimate rate is its actual primary losses during the year plus the loading for basic costs (233-36).[9] The loading for basic costs, stated by the Commission as a percentage of the total ultimate rate,[10] is in effect a percentage of actual primary losses (26-27, 233-36, 11a-12a).

There was a minimum annual self-rater charge of $250 during 1948-53 but the Commission sometimes failed to collect it (29, 245).

Aside from the crucial question of the different base to which it is applied, the self-raters' loading factor for basic costs during 1948-53 was approximately the same as that for general policyholders.[11]

During 1948-53 the Commission appropriated for basic costs the same percentage of all premiums received from the general policy holders and self-raters, i.e., .2632 consisting of: .0931 for adminstrative expense, .1371 for the Catastrophe Reserve and .0330 for the Reserve for Anticipated and Unexpected Losses (22-23).

3. *The Discrimination and the Results Thereof*

The crux of the discrimination between the general policyholders and the self-raters is the different bases to which approximately the same loading rates for basic costs have been applied. In the case of the general policyholders, the loading rate has been applied to *premium rates* for pri-

[9]Self-Rating Plan §§ III, XI, XII and XV as amended (225-27).

[10]Self-Rating Plan § XI as amended (225-26).

[11]During 1948-53 the loading rates for basic costs were .3072 of actual primary losses (.2350 of total premium) as to the self-raters and .3572 of the pure premium component (.2632 of total premium) as to the general policyholders (23-24, 227). The difference is presumably accounted for by the fact that "anticipated and unexpected losses" of the self-raters are apparently treated by the Commission as primary or catastrophe losses of the self-raters, as the case may be (240), and therefore, it was not felt necessary to collect from the self-raters the entire rate for the Reserve for Anticipated and Unexpected Losses.

mary losses (i.e., pure premium component), while for the self-raters it is applied to their *actual primary losses* (15-16, 235-36, 2a, 11a).[12] During 1948-53 this discriminatory difference in formulae worked to the serious disadvantage of the general policyholders and to the substantial benefit of the self-raters. The total premiums paid by the general policyholders for primary losses exceeded their actual primary losses by at least $6.4 million and therefore their contribution to basic costs was $2.3 million more than it would have been under the self-rating formula.[13] On the

[12] It is irrational to base the self-raters' contribution to the Catastrophe Reserve on their actual primary losses. It is contrary to the findings of the National Council on Compensation Insurance (used in setting rates for private and public workmen's compensation carriers all over the country) that the trends of serious and non-serious losses are based on quite different loss producing factors and tend to diverge. Kulp, *The Rate-Making Process in Property and Casualty Insurance*, 15 LAW AND CONTEMP. PROB. 493, 508 (1950); RIESENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 379 (1950).

[13]

Excess of general policyholders' premiums for primary losses over actual primary losses:	
Increase in Compensation Fund Surplus (App. Mem. p. 32 citing [1947] COMMISSION ANN. REP. p. 33, [1953] COMMISSION ANN. REP. p. 4)	$ 4,236,650.36
Transfers from Compensation Fund Surplus to Catastrophe Reserve (46)	2,235,435.52
	$ 6,472,085.88
Multiplied by the general policyholders' basic costs loading rate as a percentage of the primary loss premium (see p. 8 n. 11 *supra*)	.3572
	$ 2,311,829.08

The increase in the Compensation Fund Surplus is due entirely to the excess of general policyholders' premiums for primary losses over general policyholders' actual primary losses, inasmuch as the self-raters ultimately pay for primary losses, in any given year, only the actual amount of their primary losses (46, 235); Self-Rating Plan XV as amended (226-27). The $6,472,085.88 is a minimum figure for the gross increase in the Catastrophe Reserve since it does not inculde dividends paid to the general policyholders (see p. 6 *supra*).

other hand, the self-raters' actual primary losses were $16.7 million less than the amount they would have had to pay in premiums for primary losses if they were general policyholders and accordingly the self-raters saved a $5.1 million contribution to basic costs.[14]

During 1948-53 the self-raters' catastrophe losses exceeded their contribution to the Catastrophe Reserve by $412,262.70,[15] despite the fact that the total self-rater payroll was $478,918,556.89, i.e., an annual average per self-rater of approximately $2,575,000 (App. Mem. pp. 31-32). Thus, the self-raters not only did not contribute anything to building up the Catastrophe Reserve or even pay their own way, but in fact took out more than they paid in.

In the same period, however, there was a net increase in the Catastrophe Reserve of $2,690,053.28,[16] of which:

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[14]

Total premium of $26,560,922.39 which self-raters would have had to pay if they were general policyholders (33) multiplied by .765 (1.000 minus .235, see p. 8, n. 11 *supra*)	$20,319,105.63
Less: Self-Raters' actual primary losses (39) ..	3,522,367.14
	$16,796,738.49
Multiplied by the self-raters' basic costs loading rate as a percentage of primary losses (see p. 8, n. 11 *supra*)	.3072
Self-Raters' savings in basic costs	$ 5,159,858.06

[15]

Actual self-raters' catastrophe losses (60)	$ 1,044,306.24
Less: Sum appropriated to Catastrophe Reserve on account of self-raters—the total self-rater premium of $4,610,091.43 (37) multiplied by .1371 (22)	632,043.54
Self-Raters' deficiency in Catastrophe Reserve	$ 412,262.70

Self-raters' anticipated and unexpected losses are not listed separately in this computation in view of the fact that they are apparently treated by the Commission as primary losses or catastrophe losses, as the case may be (240).

[16]App. Mem. p. 32 citing [1947] COMMISSION ANN. REP. p. 33; [1953] COMMISSION ANN. REP. p. 4.

(a) $2,235,435.52 resulted from transfers from Compensation Fund Surplus created entirely by the excess of general policyholders' premiums for primary losses over general policyholders' actual primary losses;[17] and

(b) $708,412.85 resulted from the excess of general policyholders' contributions to the Catastrophe Reserve over general policyholders' catastrophe losses.[18]

Thus the general policyholders through higher premiums and lower dividends not only had to bear the entire burden of building up a Reserve which provided equal coverage to the self-raters, but in addition had to supply the self-raters' deficiency therein.

4. *The Purported Requirements for a Self-Rating Policy*

The Commission's purported requirements for a Self-Rating Policy are set forth in resolutions reprinted as Appendices G and H.

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[17] See p. 9 n. 13 *supra*.

[18]

Net increase in Catastrophe Reserve (p. 10 *supra*)		$ 2,690,053.28
Less:		
Transfers from Compensation Fund Surplus to Catastrophe Reserve (46)	$2,235,435.52	
Interest on Catastrophe Reserve (47)	158,467.61	
		2,393,903.13
		$ 296,150.15
Add: Self-Raters' deficiency in Catastrophe Reserve (p. 10 n. 15 *supra*)		412,262.70
Increase in Catastrophe Reserve due to general policyholders' direct contributions minus catastrophe losses		$ 708,412.85

From May 17, 1948 to October 4, 1952, the stated requirements were: (a) an annual payroll of $1,000,000 and (b) hospital facilities or access thereto (42a, 128).[19]

It should be noted that:

(a) The 1948-52 resolution states that the listed factors do not conflict with the Commission's unlimited discretion to approve an application for a Self-Rating Policy. Indeed, the Commission has arbitrarily classified as self-raters firms which do not meet the requirements (130-31).

(b) The requirements for a Self-Rating Policy do not on their face have any relation to the hazards or safety records of the self-raters' businesses.[20]

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[19]The resolution dated October 4, 1952 reduced the payroll requirement to $750,000 and added the following requirements: (a) filing of financial statements, showing sufficient liquid assets adequately to protect the Fund and employees, (b) probability of continuous existence, (c) "a reasonable distribution of the risk involved so that there will not exist a selection against the fund," and (d) financial ability to make a deposit and, upon leaving Arizona, a wash-out policy (43a-44a, 129-30).

[20]The emphasis in the requirements on financial strength apparently arises from a desire to insure that the self-raters have the ability to repay the Fund the amount of their primary losses. However, financial strength has no rational relation to giving the self-raters what is, in effect, a lower rate of contribution for basic costs. The self-raters do not repay the Catastrophe Reserve for losses paid therefrom to their employees. Nor do the self-raters repay the Fund for the ultimate amount of administrative expenses incurred on their account (27, 228).

Indeed, the Arizona Supreme Court has noted that even in regard to primary losses the self-raters are far from assuming the full risks of self-insurance. The adjustment to primary losses in the self-raters' premium is made retroactively, so that during any given year a self-rater has merely paid in advance a premium for coverage. *Industrial Commission v. Arizona Power Co.*, 37 Ariz. 429, 434-35, 295 Pac. 305, 308, *aff'd on rehearing* 38 Ariz. 44, 297 Pac. 452 (1931).

Among the self-raters are extremes of hazard: an explosives manufacturer (Apache Powder Company), an underground mine (Miami Copper Company)—and lack of hazard: Western Union Telegraph Company and Phelps Dodge Mercantile Company, a general merchandising firm.[21] As a matter of fact, the self-raters as a group appear to be engaged in enterprises more dangerous than the average.[22]

(c) Many self-raters are huge corporations. However, it is impossible to rationalize the classification on the payroll size of the self-raters. For example, the self-raters' payrolls in 1953 ranged from $12,025.12 to $13,695,747.57 (App. Mem. pp. 35-36).

It is therefore evident that there is no justification whatever for the discriminatory benefits afforded the self-raters as a class of policyholders.

B. Employers' Liability Act Insurance

In addition to having a Workmen's Compensation Act compulsory as to the employer (ARS §§ 23-1021,1025), Arizona has an Employers' Liability Act (ARS §§ 23-805) under which an employee may recover damages from his employer provided that: (1) the employee rejected Workmen's Compensation coverage prior to his injury or (2) the employer failed to cover his Workmen's Compensation liability as required by statute (ARS §§ 23-906(A), 907(A), 961(A).

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[21]See App. Mem. p. 36; MANUAL, p. 7 *supra* at pp. C19 original printing, C29-30 original printing and first reprint and C47 second reprint showing drastically divergent manual rates for such businesses.

[22]During 1948-53 the Commission appropriated to the Catastrophe Reserve, .1371 of all premiums received from the general policyholders and self-raters (22). The self-raters' catastrophe losses exceeded the appropriation on their account, while the general policyholders' catastrophe losses were less than the appropriation on their account (see pp. 8-11 *supra*).

Employers' Liability Act losses of both general policyholders and self-raters are paid out of the Compensation Fund or the Catastrophe Reserve as the case may be (10).

The general policyholders, however, are required to pay a substantial additional premium for Employers' Liability Act coverage above $10,000/20,000. For example, the additional premium for coverage up to $100,000/200,000 is 25% of the manual rate premium (127, Commission General Rule XI at MANUAL p. 7 *supra* at page R. 8-9). Although the self-raters receive coverage above $10,000/20,000 they are not required to pay any additional premium therefor (15a).

In addition, while general policyholders cannot obtain coverage above $300,000/500,000,[23] self-raters automatically receive *unlimited* coverage (15a).

In the courts below, the appellees asserted that the self-raters' loading rate for basic costs covered in addition unlimited Employers' Liability insurance.[24] Assuming this were true, the discrimination as to basic costs would be even greater than that described above (see p. 8 *supra*).

II. Proceedings

A. Proceedings before the Superior Court and the Commission

Appellant's theory in the lower courts was that under a proper construction of ARS § 23-983(E) and the Self-Rating Policy, the Commission was required to apply to the

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[23] According to the table before the Arizona Supreme Court the limit was $300,000/500,000 (15a). The limit is now apparently $500,000/500,000. Commission General Rule XI at MANUAL p. 7 *supra* at page R. 8-9.

[24] Corporate Appellees' Memorandum in Support of Objection to Motion and Amended Motion for Rehearing pp. 23-24.

self-raters the same formula as that applied to the general policyholders for calculating charges for basic costs and additional Employers' Liability insurance (24-25, 257-58, 268, 5a, 15a).

In the three causes of action in No. 81797 appellant asked for:

(1) a declaratory judgment that the formula used by the Commission to compute the self-raters' payments for basic costs was illegal (Causes of Action 1 and 2, pp. 53, 63);

(2) judgment against the Commissioners individually for the difference between the amount they were legally required to collect from the self-raters for basic costs and the amount actually collected (Cause of Action 1, pp. 42-50, 53); and

(3) judgment against the self-raters for (a) payments to their employees from the Catastrophe Reserve and (b) the difference between what they were legally required to pay for administrative expenses and what they actually paid (Cause of Action 2, pp. 58-64).

The Superior Court dismissed the complaint for want of jurisdiction on the ground that appellant had not exhausted its administrative remedy under ARS § 23-945 by petition to the Commission for a hearing on the reasonableness and lawfulness of Commission orders (37a, 29a).

Appellant then proceeded before the Commission on its pending petition. That proceeding resulted in a decision by the Commission that the Self-Rating Plan and Policy were reasonable and lawful and conformed with the requirements of the statue (245). However, the Commission made drastic changes in the self-rater formula for 1954 and later years.

obviously to rectify the untenable situation revealed by appellant's proceeding.[25]

Appellant then instituted Cause No. 86889, in which it realleged the three causes of action in No. 81797 and added a fourth cause of action seeking principally a de novo review of the Commission's decision (257-69, 373-75).

The Superior Court dismissed the complaint (on grounds no longer relevant in view of the Arizona Supreme Court decision[26]), except that it sustained a portion of the fourth cause of action as against the Commission on the ground that appellant was "entitled to its appeal from the Commission's Decision . . . with regard to the reasonableness or lawfulness of the Commission's orders in fixing rates for the year 1954" (31a-36a).[27]

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[25]The Commission increased the self-raters': (a) loading factor for basic costs to .3000 of the total premium, (a .28 increase over 1948-1953), (b) excess loss limit to $28,250 (a .61 increase over the previous figure) which has the effect of increasing the amount of self-raters' losses classified as primary and thereby increasing the self-raters' contribution to basic costs (see p. 8 *supra*), and (c) minimum premium to $1,000 (a 300% increase) (251-53).

The Commission expressly found that the 1954 self-rater formula was reasonable and sufficient to provide for a reasonable contribution to the building up of the Reserves and for administrative expenses (239-41).

Appellant's petition specifically put 1948-53 practices in issue but the Commission denied the relief appellant demanded in regard to those years (74, 119-20, 250). For example, the Commission denied appellant's demand for relief in regard to the 1948-53 transfers from Compensation Fund Surplus to the Catastrophe Reserve (250, 74, 119, 139). However, the Commission did not make findings of reasonableness and sufficiency with regard to the 1948-53 rates as it did with regard to the 1954 rates.

[26]The grounds were: (a) the Commissioners were not liable for authorizing the self-rating formula in the absence of fraud even if the formula were illegal; (b) as to claims involving 1948-53, appellant failed to exhaust its administrative remedy; (c) the court lacked jurisdiction to set a rate; (d) insofar as appellant was suing on behalf of the Commission, it was an improper class action; (e) in Cause of Action 2 appellant did not allege facts showing that the self-rating formula was illegal; and (f) in the absence of conspiracy or fraud the self-raters are required to pay only the amount fixed by the Commission (31a-36a).

[27]The Commission's orders fixing rates for the year 1954 are not involved on this appeal except insofar as they indicate the unreasonableness of the 1948-53 self-rater payments.

B. Proceedings before the Supreme Court of Arizona

1. *Decision of July 15, 1959*

The Supreme Court affirmed the judgments. In doing so it expressly disposed of the case on the merits. The court held that:

(a) ARS § 23-983(E) and the Self-Rating Policy give the Commission discretion to determine whether the self-raters' basic costs payments should or should not be modified in accordance with loss experience;

(b) the Commission's decision, embodied in the Self-Rating Plan, to apply the self-raters' loading rate for basic costs to the amount of their actual primary losses was authorized by the statute; and

(c) the self-raters are not required to pay the additional premium which the general policyholders must pay for Employers' Liability coverage above $10,000/20,000 (3a, 5a-6a, 10a-11a, 15a).

2. *Appellant's Motion for Rehearing*

Appellant moved for a rehearing upon the grounds, among others, that ARS § 23-983(E), as construed by the court and as applied by the Commission, deprived the general policyholders of their constitutional rights under the Fourteenth Amendment to due process and equal protection.

Appellant contended in its amended motion for rehearing:

"3. Rehearing should be granted because the Court's rejection of appellant's Basic Costs Claim and the Court's tacit rejection of appellant's Alternative to its Basic Costs Claim deprives appellant and the class which it represents of their constitutional rights to due process of law and equal protection of the laws under the Arizona Constitution (Art. 2,

Sec. 4; Art. 2, Sec. 13) and the Constitution of the United States (Amend. XIV)." (Amended Motion for Rehearing p. 1).

Appellant's memorandum in support of its amended motion for rehearing quoted the due process and equal protection clauses of the Fourteenth Amendment and asserted, *inter alia*, that:

> "Arbitrary legislative selection for discriminatory treatment violates the guarantee of equal protection of the laws preserved by the federal constitution (Amendment Fourteen)." (App. Mem. p. 33 citing United States Supreme Court decisions).
>
> ". . . . [T]he label 'self rater' under the Commission's administration of . . . 23-983(E) . . . is the most arbitrary and unreasonable 'classification' imaginable. The self-raters are a completely heterogeneous group with absolutely nothing in common save and except for their 'self rater' policy with the Commission. . . ." (id. 35).

In its amended motion for rehearing appellant further asserted:

> "5. Rehearing should be granted as to appellant's Employer's Liability Act Coverage Claim because (a) under the Court's opinion the lower court's ruling of dismissal should not have been affirmed but this claim should have been remanded, and (b) if the Court's opinion does not result in remand, appellant and the class which it represents will have been denied their constitutional rights to due process of law and equal protection of the laws under the Arizona Constitution (Art. 2 Sec. 4; Art. 2 Sec. 13) and the Constitution of the United States (Amend. XIV)." (Amended Motion for Rehearing p. 2).

3. *Decision of March 2, 1960 on Rehearing*

"On rehearing the Supreme Court adhered to its earlier decision (19a).[28] It reiterated its determination to dispose of the case on the merits (16a-17a, 19a).

In respect of appellant's claim that ARS § 23-983 (E), as construed and applied to basic costs, violated the Fourteenth Amendment, the court stated:

> "Appellant now urges that the court's construction of the self-rating endorsement and the self-rating (experience rating) plan permits a 'totally unbridled discretion to charge or not to charge' for basic costs, and hence destroys the constitutionality of the self-raters' statute, A.R.S. § 23-983, subd. E. It is to be confessed that we do not quite follow appellant's argument in this respect. If appellant is asserting that the self-rating statute as construed by the court is unconstitutional, then appellant will not be heard in an attempt to raise such an issue. The rule of law is well established that one who has invoked the provision of a statute, sought to avail himself of its terms, and has been an actor thereunder, may not thereafter question its constitutionality. Haggard v. Industrial Commission, 71 Ariz. 91, 223 P. 2d 915; Stuart v. Norviel, 26 Ariz. 493, 226 P. 908.
>
> If it be considered that the self-rating statute now permits arbitrary and capricious action by the Commission, appellant's position is patently unsound since, as pointed out in the original opinion, by the specific language of the statute the Commission is directed to provide for the specified items of basic costs in fixing a rate of premium. The Commission does not have unbridled discretion to charge or not to charge at will for basic costs. It 'shall' provide for a rate 'to meeet' the specified items and hence is manifestly prohibited from establishing a rate which will not meet the basic costs of the self-raters.

[28] Except that it corrected the error noted at p. 3 n. 3 *supra* (16a).

> "If appellant's constitutional objection is that a statute, even though valid on its face, can be administered as to be arbitrary and capricious, then the simple answer is that the statute, A.R.S. § 23-946, affords a method for obtaining judicial review of that administrative action.[29] We find nothing unconstitutional in being given a method by which the Commission's orders may be attacked or in being required to pursue that method." (17a-18a).

The court completely ignored appellant's Employers' Liability Act coverage claim. It stated that:

> "Finally, appellant has advanced other grounds for reversing this court's decision. They consist primarily of a reargument of its initial position. By long established rule of court they are not grounds for reconsideration." (19a).

THE FEDERAL QUESTIONS WERE "DRAWN IN QUESTION" WITHIN THE MEANING OF 28 USC § 1257(2)

I. Federal Questions Properly Raised

The constitutional issues were sufficiently "drawn in question" by appellant's application for rehearing.

Missouri ex rel Missouri Ins. Co. v. *Gehner*, 281 U. S. 313 (1930) held that when a federal question is first brought into the case by a state supreme court decision on a novel issue of statutory construction or application, which appellant was not "reasonably . . . bound to anticipate", it is sufficiently "drawn in question" if raised in a petition for rehearing, even if the state court refuses to consider the federal question. ROBERTSON & KIRKHAM, JURISDICTION

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[29] Appellant, it will be noted, urged on appeal that it had put the 1948-53 rates in issue at the Commission hearing and that therefore the exhaustion doctrine did not apply (Appellant's Reply Brief pp. 54-55).

OF THE SUPREME COURT § 76 (1951 ed.); STERN & GRESSMAN, SUPREME COURT PRACTICE 89 (2d ed. 1954).

This is precisely the situation in the instant case. The Arizona Supreme Court decision was the first construing ARS § 23-983(E), the Self-Rating Plan and the Self-Rating Policy as applied to the factual situation here presented and the questions arising therefrom (2a-15a).

Appellant was not "reasonably . . . bound to anticipate" the holding on either claim. The Arizona Supreme Court's construction of the Self-Rating Policy in regard to basic costs was not the construction urged by appellees.[30] The court itself admitted that in regard to the basic costs claim the Self-Rating Policy was ambiguous (7a). The court's disposition of appellant's Employers' Liability Act claim was even less to be anticipated inasmuch as the self-raters' Brief did not even discuss the merits of this issue.

It is immaterial, under *Missouri ex rel Missouri Ins. Co.* v. *Gehner*, *supra*, that the opinion on rehearing did not decide appellant's claims of unconstitutionality.

II. The Doctrine of Estoppel Does Not Apply

The Arizona Supreme Court asserted that appellant was estopped to challenge the validity under the Federal Constitution of the court's construction of ARS § 23-983(E) in regard to basic costs, inasmuch as appellant based its

[30] In their Brief in the Arizona Supreme Court the self-raters stated:

> "Thus, it is clear that the contracting parties specifically rejected manual rates as a basis for computing all or any part of the premium to be paid under the policy." (p.14)

The Arizona Supreme Court stated that the Commission did not promise anything in the Self-Rating Policy with regard to the method of computing the basic costs charge. Rather the policy left the Commission with discretion as to whether or not to base the charge for basic costs on manual rates and the Commission exercised this discretion in the Self-Rating Plan (5a-6a, 9a-11a).

suit upon the statute and was an "actor thereunder" (18a). This ruling is directly contrary to decisions of this Court.

International Steel & Iron Co. v. *National Surety Co.*, 297 U. S. 657 (1936) is precisely in point. That case held that when plaintiff-appellant's suit rested, in part, on a reasonable interpretation of a statute not yet construed by the courts on the point at issue and the state supreme court rejected appellant's interpretation thereof, appellant was not estopped to raise, in an application for reargument, an objection to the constitutionality of the statute as construed. ARS § 23-983(E) had never been construed by the courts on the issues presented by appellant. When the Arizona Supreme Court rejected appellant's interpretation, appellant could, under *International Steel*, challenge the constitutionality of the statute as construed.

Appellant cannot be estopped to challenge subsection (E) as an "actor thereunder." Appellant is not a self-rater and therefore does not receive any benefits under ARS § 23-983(E). To the contrary, appellant has insisted from the outset of this litigation that ARS § 23-983(E), as applied by the Commission, confers benefits on a class of insureds of which appellant is not a member and affirmatively harms appellant and the class of which it is a member (e.g., 24-26, 42-44, 58-67, 257-58, 260, 263-68).

The liability imposed on the employer by the Arizona Workmen's Compensation Act is compulsory (see p. 13 *supra*). *Obrecht-Lynch Corp.* v. *Clark*, 30 F. 2d 144 (D. Md. 1929) held that an employer was not estopped to question the constitutionality of a compulsory workmen's compensation act even though it had taken advantage of the act's insurance provisions.

Even assuming (unrealistically) that insuring with the State Compensation Fund is not required and even though Arizona need not maintain an insurance fund, appellant as a policyholder of the Fund may challenge the constitu-

tionality of the discriminatory treatment accorded the class of insureds of which appellant is a member. A state may not unreasonably discriminate in dispensing a discretionary service. *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955) (public golf course and public parks); *Mayor & City Council of Baltimore City* v. *Dawson*, 350 U. S. 877 (1955) (public beach); *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (appellate procedure); *Note*, 73 HARV. L. REV. 1595, 1603 (1960).

Although Federal law determines *who* may raise a Federal constitutional objection to a state statute (*Allied Stores, Inc.* v. *Bowers*, 358 U. S. 522, 525 (1958)), the Arizona court cited for its conclusion as to estoppel only two Arizona cases: *Haggard* v. *Industrial Commission*, 71 Ariz. 91, 223 P. 2d 915 (1950) and *Stuart* v. *Norviel*, 26 Ariz. 493, 226 Pac. 908 (1924). Neither of these cases is in point.

The *Haggard* case held that an employer who sought to compel the issuance of a policy at established rates covering persons concededly employees but excluding others the Commission contended were also employees, could not, on appeal from the Commission's refusal, contend that the Act was unconstitutional because it did not establish a standard to guide the fixing of rates. In the instant case, appellant has challenged the self-raters' formula throughout the litigation.

The *Stuart* decision held that a party who petitioned the Water Commissioner to determine his rights in a stream could not, on appeal from an adverse decision, claim that the statute giving the Commissioner jurisdiction was unconstitutional on the ground that it granted the Commissioner judicial power. Appellant's Federal constitutional challenges are directed not against the jurisdiction of the Commission or the Arizona courts, but rather against the insurance scheme their decisions approved.

III. The Doctrine of Failure to Exhaust State Remedies Does Not Apply

The appeal is not barred by a failure to exercise any alleged state remedy under ARS §§ 23-945 and 946, i.e., by petition to the Commission to review the reasonableness of its orders with an appeal to the Superior Court.

The exhaustion doctrine does not apply when the adequacy of the alleged state remedy is uncertain. *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946); *Young* v. *Ragen*, 337 U. S. 235 (1949); 3 DAVIS, ADMINISTRATIVE LAW § 20.07 at 98 (1958).

An essential part of appellant's claim is to recover on behalf of the Commission or the general policyholders the amount by which, during 1948-1953, the self-raters were benefited or the general policyholders damaged by unconstitutional discrimination.

The alleged state remedy cannot provide this relief:

1. The Commission cannot render judgment for monies due the Fund. *O'Neill* v. *Martori*, 69 Ariz. 270, 212 P. 2d 994 (1949); *Industrial Commission* v. *J. & J. Const. Co.*, 72 Ariz. 139, 148, 231 P. 2d 762, 768 (1951), relying on ARS § 23-929.

2. Even if the Commission were to hold that during 1948-53 the self-raters' payments for basic costs and Employer's Liability Act coverage were unreasonably discriminatory, it is at best uncertain whether an action for the recovery of money could be brought against the self-raters based on this decision.

The Arizona Supreme Court held that the self-raters are not proper parties on appeal from a Commission decision (16a).

The Arizona court stated in both of its opinions that its dismissal of appellant's claims against the self-

raters was on the merits (15a, 17a). Therefore, under familiar principles of res judicata,[31] followed in Arizona,[32] a new action against the self-raters based on the same facts (the manner in which the Self-Rating Plan operated during 1948-53), although perhaps on a different theory, would be barred.

Furthermore, the exhaustion doctrine does not apply when resort to the state remedy is certain to result in an adverse decision. *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34 (1934); *Montana Nat'l Bank* v. *Yellowstone County*, 276 U. S. 499 (1928); 3 DAVIS, p. 24 *supra* at 98-99.

An adverse decision of the Commission on the reasonableness of the 1948-53 self-raters' payments for basic costs and additional Employers' Liability coverage is certain because the Commission has already made up its mind on the issue.[33]

Still further, the exhaustion doctrine does not apply where, as here, its effect is to place the appellant on a "merry-go-round" of state procedure. *Young* v. *Ragen*, 337 U. S.

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[31] RESTATEMENT, JUDGMENTS §63; *F. L. Mendez & Co.* v. *General Motors Corp.*, 161 F. 2d 695 (7th Cir. 1947), *cert. denied*, 332 U. S. 810 (1947); *Williamson* v. *Columbia Gas & Elec. Corp.*, 186 F. 2d 464 (3d Cir. 1950), *cert. denied*, 341 U. S. 921 (1951).

[32] *Wahl* v. *Round Valley Bank*, 38 Ariz. 411, 300 Pac. 955 (1931); *Lauderdale* v. *Industrial Commission*, 60 Ariz. 443, 139 P. 2d 449 (1943); *Hoff* v. *City of Mesa*, 86 Ariz. 259, 344 P. 2d 1013 (1959).

[33] The self-raters' Brief in the Arizona Supreme Court asserted:

> "Appellant's complaints not only failed to allege facts showing that the premiums charged to and collected from self-rating policyholders were not fixed in accordance with law or were unreasonable, but proposed rates which, as a matter of law, would be unreasonable, and unlawful." (p. 47).

The Commission Brief asserted:

> ". . . . [C]ounsel . . . has had an opportunity to examine . . . the Briefs to be filed by . . . the other parties defendant . . . [and] concurs with all propositions . . . which will appear in said Briefs. . . ." (p. 11)

235 (1949). Appellant has already tried the procedure under ARS § 23-945 and 946 with regard to the 1948-53 practices[34] and, under the *Young* case, appellant is not required to try it again before appealing to this Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. Importance of Decision

This case is of importance to every employer and employee in Arizona. The discrimination that appellant alleges took place in 1948-53 amounted to at least: (1) a $5.1 million difference between the basic costs premium the self-raters fairly should have paid and the basic costs premium they actually did pay;[35] (2) an increase of $2,690,053.28 in the Catastrophe Reserve which afforded the self-raters protection equal to that given to general policyholders solely by virtue of the contributions of the general policyholders.[36]

The Arizona State Federation of Labor, fifteen trade associations and twenty-seven businesses entered appearances before the Commission as members of appellant's class (App. Mem. p. 1). Sixteen law firms filed a Brief Amicus Curiae in the Arizona Supreme Court asking that the court grant rehearing to consider appellant's constitutional objections.

The danger of discrimination in rates in favor of large influential insureds was a motivating force in the creation of state funds and in the grant to administrative bodies of the right to regulate private insurance company Workmen's Compensation rates. 12 SCHNEIDER, WORKMENS COMPEN-

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[34] See p. 16 n. 25 and p. 20 n. 29 *supra*.
[35] See pp. 9-10 *supra*.
[36] See pp. 10-11 *supra*.

SATION TEXT § 2507 (1960); LANG, WORKMEN'S COMPENSATION INSURANCE 179 (1947).

This case is of long range importance in the development of constitutional law because as the scope of government activity in the economy expands and further public welfare programs are undertaken, it becomes increasingly important that the government fairly allocate the cost burden of its activities. *Cf.* Jones, *The Rule of Law & the Welfare State*, 58 COLUM. L. REV. 143, 155 (1958).

II. The Federal Questions are Meritorious

It is a factor militating for reversal that this appeal is from the dismissal of the complaints, without hearing the evidence, of a plaintiff asserting violation of its Federal constitutional rights. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194 (1934) reversed dismissal of the complaint on the ground that the facts alleged, if true, brought into question whether there was a rational basis for the challenged discrimination. *Accord, Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (1935) (Brandeis, J.).

Morey v. *Doud*, 354 U. S. 457, 465 (1957) reaffirmed the long established standards applicable to an economic statute challenged under the equal protection clause. The statutory classification will be held invalid when it is not "based on differences that are reasonably related to the purposes of the Act in which it is found," and the inequality is substantial. Arbitrary classification also violates due process of law. *Griffin* v. *Illinois*, 351 U. S. 12, 18 (1956).

Here, the self-raters are arbitrarily classified for the purpose of allowing them lower rates for catastrophe losses under the Workmen's Compensation Act and additional Employers' Liability coverage and setting their contribution for administrative expense at less than a fair share thereof.

As noted above, the requirements for a Self-Rating Policy do not have any relation to the hazard or safety record of self-raters, as proven by actual experience. The requirements are therefore diametrically opposed to the fundamental actuarial principle, universally accepted in the United States, that workmen's compensation rates be based on a careful classification of business operations with regard to the hazards presented. LANG, p. 27 *supra* at 159-62, 176-77; RIESENFELD & MAXWELL, p. 9 *supra* at 375-77; Kulp, p. 9 *supra* at 507-08.

Moreover, the Commission is not bound by the listed "requirements" and has in fact arbitrarily permitted firms which do not meet the requirements to become self-raters.

The arbitrary classification of the self-raters, utterly without regard to hazard, is one of the factors which render the scheme unlike the experience rating and retrospective rating plans in force in other states. These plans, which take individual loss experience into consideration in fixing the premium, are, in virtually all instances, open to all employers, or to employers which have a satisfactory safety record, or have complied with prescribed safety requirements, or have met a minimum premium requirement. LANG, p. 27 *supra* at 163-64, 169-76; Kulp, p. 9 *supra* at 497, SCHNEIDER, pp. 26-27 *supra* at § 2508.[37]

In the instant case, as in *Morey* (354 U. S. at 468-69), the discrimination favors a few huge corporations at the expense of many small businesses. However, the wide variations in the self-raters' payrolls (from $12,025.12 to $13,695,747.57 in 1953) makes it impossible to justify a

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[37] These plans are also unlike the Arizona plan in that with regard to the aspects of the Self-Rating Plan here challenged, the self-raters' premiums are not based on their actual losses.

In the *Morey* case the Court stated:

> "'Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.'" (354 U. S. at 464)

lower payment for administrative expense on any assumed theory that such expense does not increase proportionately with an increase in the size of payroll.

Because the requirements for self-rating have no relation to the size of the risk (i.e., the amount of the applicant's manual rate premium), the Arizona scheme is completely unlike the Premium Discount Plan in force in other states. This plan gives a discount to all employers with above a minimum premium, the discount increasing with an increase in premium. See, e.g., *State Compensation Ins. Fund* v. *McConnell*, 46 Cal. 2d 330, 294 P. 2d 440 (1956); Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 141-42 (1952).

It is immaterial that the underlying statute does not in its provisions set up the standards for self-rating. A statute fair on its face is nevertheless unconstitutional when it is applied so as to effect unreasonable discrimination. *Yick Wo.* v. *Hopkins*, 118 U. S. 356 (1886); *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441 (1923).

If premiums paid to the State Fund are viewed as a tax to pay for Workmen's Compensation Act benefits the case is governed by *Sioux City Bridge Co.* v. *Dakota County*, *supra*, which held that discriminatory assessments made under a property tax statute, fair on its face, violate equal protection of the laws. If state fund insurance is viewed as a government benefit or service for which the premiums are a requirement, the case is governed by the authorities holding that a state may not make unreasonable discriminations in dispensing a discretionary benefit or service (authorities cited p. 23 *supra*).

CONCLUSION

This appeal presents Federal questions of great importance in terms of constitutional principle and economic effect. The questions are so substantial as to require plenary consideration on the merits and oral argument for proper resolution. This is particularly true inasmuch as the scheme challenged is unique, the case arose on the dismissal of complaints and the Arizona Supreme Court refused on indefensible grounds to consider appellant's constitutional claims on the merits.

Respectfully submitted,

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July 20, 1960

APPENDIX A

Opinion of the Supreme Court of the State of Arizona of July 15, 1959

STRUCKMEYER, Justice.

This consolidated appeal has as its primary objective the testing of the lawfulness of certain premium rates fixed by The Industrial Commission of Arizona for a class of policyholders hereinafter referred to as "self-raters." Appellant, in its complaint in the court below, Cause No. 6177, stated three claims for relief. All claims were dismissed in response to motions by appellees. Thereupon, appellant appeared before the Commission, asserting that the order establishing the rates for premiums for the self-raters was unreasonable and unlawful. From an adverse decision there, appellant filed a second complaint in the court below, Cause No. 6414, stating four claims for relief. Of these, all were dismissed as against the individual defendants, Industrial Commissioners and former Industrial Commissioners. As to the corporate defendants, three of appellant's claims were dismissed, and part of the fourth. That part of the fourth which attacked the order of the Commission as unreasonable was not dismissed, it being the opinion of the lower court that a claim for relief was stated to review the administrative action of the Commission. These appeals question the correctness of the orders dismissing the claims in both actions.

The Workmen's Compensation Law of this state requires an employer to insure his employees in one of three ways: (1) by insuring in the state compensation fund; (2) by insuring with a private corporation, or (3) by qualifying as a self-insurer. Subsection A, A. R. S. § 23-961. The corporate appellees named in appellant's complaint are employers in the first class; that is, they insure in the state

compensation fund. However, they insure in a special category as self-raters, pursuant to the authority of subsection E, A. R. S. § 23-983, infra. Self-rating is the modification of premium dependent upon actual loss experience.

Appellant is one of some thirteen thousand policyholders insured by the Commission under the Workmen's Compensation Act, called "general-class policyholders" as distinguished from the thirty-odd appellee "self raters." The Commission fixes rates of premium for the coverage afforded in the compensation fund for all policyholders. The rates fixed are: A rate for primary losses; that is, losses up to a specified amount per accident (the catastrophe limit), and a rate for basic costs; that is, the rate for expenses of administration and for the creation and maintenance of specified reserves.

Claim on Basic Costs

The Arizona Workmen's Compensation Law was originally enacted in 1925. At that time, The Industrial Commission adopted a self-rating plan which was subsequently held by this court to be ultra vires for lack of legislative authority. Industrial Commission v. Arizona Power Co., 37 Ariz. 425, 295 P. 305. Two years later, in 1933, the legislature, undoubtedly in response to the holding in the Arizona Power Company case, adopted an amendment to the Workmen's Compensation Law, empowering the Commission to write contracts of insurance embodying a self-rating plan. This amendment, now subsection E, A. R. S. § 23-983, hereinafter called the self-rating statute, provides:

> "The commission may in its discretion endorse on any of its regularly issued policies a self-rating plan, and may apply tentative rates, subject to modification in accordance with the loss experience

> of such risks, and shall provide for a carrying charge, premium tax and a rate for creation of a catastrophe reserve and reserves to meet anticipated and unexpected losses to be fixed by the commission."

We have arrived at certain conclusions concerning the self-rating statute. *First*, and obviously, it authorizes the Commission to endorse on its policies of insurance a self-rating plan and permits tentative rates of premium to be modified in accordance with the loss experience of the assured. This does not mean that the endorsement is the self-rating plan. The self-rating plan is the modification of rates of premium in accordance with loss experience. The endorsement is merely the vehicle by which the Commission evidences its intention to be bound to the self-rating plan. It is the authority by which an assured may compel the Commission to compute premiums in accordance with the plan. *Second*, the language of the statute neither requires nor prohibits the Commission from modifying the rate of premium for basic costs upward or downward in accordance with loss experience. It is entirely discretionary as to whether any modification is to occur. Although carrying charges, etc., "shall be provided for," this is not to say that these items of basic costs are excluded from modification in accordance with loss experience. The Commission is simply directed to provide for the specified items in fixing a rate of premium. *Third*, no attempt has been made by the legislature to control the manner or provide a formula by which tentative rates must be modified except only that the modification be in accordance with loss experience. Such modification may be on a 100 per cent or lesser basis as long as it has some relationship to loss experience.

The policy of insurance issued by the commission is, of course, the contract between the commission and the assured. It provides that the commission is directly and primarily

liable to the employees of the assured (or in the case of an employee's death, to his dependents) to pay the compensation and accident benefits established by the Workmen's Compensation Law. While the policy is specifically conditioned upon payment of premiums by the employer, there is nothing contained within it by which the amount of the premium can be ascertained or calculated. There is, however, this clause:

> "Experience And Hazard Rating: Unless otherwise specified by endorsement hereon, the employer agrees to accept and abide by any experience rating plan and/or hazard rating schedule adopted and published by The Industrial Commission of Arizona; and the employer agrees to accept any increase or reduction in the rate or rates required by the application of such experience rating plan and/or hazard rating schedule and further agrees that the effective date of such changes shall be fixed by The Industrial Commission of Arizona."

By the foregoing clause, the employer is bound to the rates of premium to be determined from the two documents, the "Experience Rating Plan" and the "Hazard Rating Schedule" and at least in so far as the contract is concerned, the Commission may compute the premium from either or both, in its discretion. The discretion of the Commission in determining to be bound solely by the rating plan is evidenced by issuing its endorsement in compliance with the self-rating statute. It should be stressed that under the express terms of the policy, independent of any endorsement, the assured is committed to the payment of rates of premium predicated on the two methods provided therein, but the Commission can only be compelled to charge the rates of premium in accordance with the self-rating plan if it binds itself by endorsement.

The endorsement which the Commission issued pursuant to the authority of the self-rating statute in its material part reads:

> "Except as regards the loading for expense of administration and for catastrophe and excess losses, the rate or rates of premium for this policy shall be subject to the experience rating plan of The Industrial Commission of Arizona on a 100 percent self-rating basis, i.e., the rate or rates shall be modified upward or downward in direct proportion to the ratio of actual loss experience (exclusive of catastrophe and excess losses) to the expected loss experience (exclusive of catastrophe and excess losses)."

It is appellant's position that the language of the endorsement clearly and unambiguously subjects the rates of premium for the policy to the rating plan of the Commission except the rate of premium for basic costs. It is argued, in effect, that the rate of premium for basic costs is excepted from the experience rating plan of the Commission and hence must be computed from the rate or rates of the regularly issued policy—presumably from the hazard rating schedule. We cannot agree with appellant's conclusions for several reasons.

First, as has been pointed out, the policy is the contract between the parties. By the express provision thereof, the employer has agreed to abide by the experience rating plan and/or hazard rating schedule, but the Commission has not agreed to compute rates of premium in accordance with either. If the Commission's obligations under the contract are to be changed, then it must be because of the promises contained within the endorsement.

Clearly, the Commission, by the endorsement, has promised to compute the rates of premium subject to the experience rating plan on a 100 percent self-rating basis. The question then becomes, what else, if anything, has the Commission promised? An examination of the exception discloses that it, itself, is not a promise by the Commission and hence no promise can be implied therefrom. Stated another way, by the endorsement the Commission has agreed

to a modification of the rates of premium on a 100 per cent basis as established in the rating plan, and the exclusion by the exception is no more than a statement that the Commission does not bind itself to charge a rate of premium for basic costs subject to modification on a 100 per cent basis. Clearly, the Commission has not promised how the rates of premium for basic costs shall be computed. Therefore, the exception is simply an exclusion of basic costs from the promise of the Commission to compute all rates of premium subject to the rating plan on a 100 per cent basis. In this sense, the exception in the endorsement is not a true exclusionary clause as is commonly found in insurance policies. The excepted items of basic costs are not excluded from the operation of the policy or the coverage thereof. They are excluded from the operation of the Commission's promise as to how rates of premium shall be computed.

A simple illustration will point out the significance of the language used. Assume that A is hired by B to work by the week. If B promises that the hours of labor shall be from 9 to 5 except as regards Saturdays and Sundays, it cannot be concluded that this promise means that A is not to work for B on Saturdays and Sundays. Similarly, the assured, by the express terms of the policy, has agreed to be bound to a computation of premiums, *all the premiums*, in accordance with the experience rating plan. The Commission, by agreeing that the rate of premium for primary losses shall be modified on a 100 per cent self-rating basis subject to [the formula in] the self-rating plan, has not agreed or promised anything at all regarding the computation of the rates of premium for basic costs. The assured is still liable under its promise to abide by the rating plan, and the Commission is at liberty in its discretion to charge in conformity therewith. Accordingly, we conclude that the self-rating endorsement does not prohibit the computation of premium for basic costs in accordance with the self-rating plan.

Second, the conclusions stated are sufficient to dispose of appellant's contention concerning basic costs. However, if we assume that the exception can be construed as a promise regarding the computation of the rate of premium for basic costs, we are led ultimately to the same conclusion.

From the statement of appellant's claim, it can be understood that its case is predicated primarily on the specific language of the endorsement. Nevertheless, appellant's construction is not necessarily the only meaning which can be ascribed thereto. The endorsement is also susceptible of the interpretation that the rates of premium for the policy shall be subject to the rating plan on a 100 per cent self-rating basis except for basic costs which shall be subject to the rating plan, but not on a 100 per cent self-rating basis.

A simple hypothetical example will serve to clarify the problem here presented. Assume this statement:

> "Except as regards the 29th Division, the units shall be subject to the attack plan of the Eighth Army on a 24-hour alert basis."

Like the self-rating endorsement, the sentence, standing alone, is susceptible of either of two possible interpretations: one, that the 29th Division is not subject to the attack plan of the Eighth Army; or two, that the 29th Division is subject to the attack plan of the Eighth Army, but not on a 24-hour alert basis. Because of the structure of the sentence, it is impossible to draw any certain conclusion from the language used. Similarly, it is impossible to draw any certain conclusion from the endorsement.

In the case of the assumed statement, to determine its meaning an additional fact must be known. That fact is whether the 29th Division is a part of the attack plan. If it is, the 29th Division must be said to be excluded only from the operation of the 24-hour alert. Similarly, the endorsement must take its meaning from the answer to the question of whether the rate of premium for basic costs is compre-

hended within the rating plan. If the rating plan does not include basic costs, then they are not brought into it by the language of the endorsement; but if basic costs are part of, and included within, the rating plan, then the exception simply excludes the rates of premium therefor from computation on a 100 per cent self-rating basis.

Appellant argues that the endorsement is plain and unambiguous and that it is not necessary, or even proper, to construe it by reference to the self-rating plan. As we have pointed out, it is impossible to draw any certain conclusion, simply because there is not sufficient literal significance contained therein to ascribe absolute meaning to it. The question here is not one of fact, but one of law, and we see no reason to refer the case back to the lower court simply for the introduction into evidence of the experience rating plan referred to in the policy. A judicial interpretation of a contract does not reach a point where the meaning of some clause can be said to be in doubt upon merely arriving at a conclusion that such clause may, as an abstract proposition, be given either of two meanings. A clause in a contract, if taken by itself, often admits of two meanings, when from the whole contract there is no reasonable doubt as to the sense in which the parties use it.

We are not compelled to interpret the endorsement independent of the self-rating plan. Matters contained in other writings which are referred to are to be regarded as part of the contract and properly to be considered in the interpretation of the contract. Day v. United States, 245 U. S. 159, 38 S. Ct. 57, 62 L. Ed. 219. We said in Industrial Commission v. Arizona Power Co., supra, that it has long been settled, without a dissenting voice, that parties may incorporate into agreements by mere reference, other writings or agreements or records, and thereby make the latter an essential part of the contract.

At this point, appellant argues that there was before the lower court, and is before this court, no evidence of the

Commission's self-rating plan; hence the plan cannot be consulted as an aid to understanding the endorsement. In effect, appellant is arguing that the lower court was compelled to determine whether a claim for relief was stated from an examination of the complaint only. We have previously held that judicial notice may be taken of the regulations of administrative bodies. For example, we have held that this court would take judicial notice of the Civil Air Regulations. Brandes v. Mittérling, 67 Ariz. 349, 196 P. 2d 464. While there is authority to the contrary, there is also authority that judicial notice may be taken of the actions of industrial commissions which implement workmen's compensation laws. Frank C. Sparks Co. v. Huber Baking Co., 48 Del. 9, 96 A. 2d 456; Daoud v. Matz, Fla., 73 So. 2d 51; Kramer v. Charlevoix Beach Hotel, 342 Mich. 715, 71 N. W. 2d 226.

It is provided by the self-rating plan in its most material parts:

Paragraph I.

> "Every employer who shall insure his liability, or any part of the same, under the Workmen's Compensation Law by obtaining from The Industrial Commission of Arizona a policy of insurance, bearing an endorsement providing that the rate or rates of premium for such policy, exclusive of the loading for expense of administration and for catastrophe and excess losses, shall be modified upward or downward in direct proportion to the ratio of the actual loss experience (exclusive of catastrophe and excess losses) to the expected loss experience (exclusive of catastrophe and excess losses), is an employer insuring with the Commission on a self-rating basis."

Paragraph II.

> "Every employer insuring with the Commission on a self-rating basis shall receive a policy to which

the Commission will assign a rate or rates of premium which shall be known as initial rates. Such rate or rates shall apply to the initial experience period, subject to retroactive modification in accordance with the experience of the insured developed during such initial experience period."

Paragraph XI as amended:

> "*Twenty-three percent (23%) of every rate shall be considered the loading for the expense of administration and for catastrophe and excess losses.*" (Emphasis supplied.)

Paragraph XII as amended:

> "Seventy seven (77%) of the premium developed by the application of the initial rate or rates to the payroll shall be considered the expected loss experience of the assured exclusive of the catastrophe and excess losses."

Paragraph XV as amended:

> "Upon the determination of the actual loss experience, the initial rate or rates shall be modified upward, if the quotient of the ratio of the actual loss experience, exclusive of catastrophe and excess losses, to the expected loss experience, exclusive of catastrophe and excess losses, is greater than 1.0; and downward if the quotient is less than 1.0. The modification of the initial rate shall be computed by multiplying 77% of the initial rate by the quotient of such ratio. The resulting figure represents 77% of the ultimate rate, to which the 23% loading *is added to give the actual ultimate rate* applicable to the payroll of the employer during the experience period." (Emphasis supplied)

The contents of the self-rating plan itself conclusively refute appellant's construction of the endorsement, for it

is specifically provided therein that 23% of every rate "shall be considered the loading for the expense of administration and for catastrophe and excess losses," and "is added to give the actual ultimate rate."

It is therefore a fact that the rate of premium for basic costs is included within the operation of the self-rating plan. If the endorsement were construed to exclude or to except basic costs from the operation thereof, all of the quoted language of paragraphs XI, XII, and XV, supra, would be rendered meaningless, and the entire rating plan, as a practical reality, would be destroyed. This is for the obvious reason that if the rate of premium for basic costs is not to be determined from the rating plan, all references therein serve no useful purpose whatsoever.

The obvious purpose of the exception is to prevent any possibility that the Commission will be compelled to modify the rate of premium for basic costs in direct proportion to the ratio of actual losses, and for good reasons. It is wholly impractical to determine the exact costs of administering the Workmen's Compensation Act for each assured. In the case of anticipated and unexpected losses, the loss is not apparent and determinable for some time—possibly years after the rating period. If the premium for catastrophe losses were computed in direct proportion to the ratio of actual loss experience, the loss might be of such magnitude as to render an employer insolvent and, in effect, be the same as no insurance at all.

Appellant has presented to this court by way of an appendix, an extended analysis as to why the rate of premium for basic costs can be computed from an examination of the rating plan but only in accordance with what it terms the rates of the regularly issued policy. We are not impressed with the argument contained in the appendix. While the argument is consistent with appellant's ultimate conclusion that the rate of premium for basic costs must be com-

puted from the regularly issued policy, it completely contradicts appellant's basic premise that the endorsement does not subject the rate of premium for basic costs to the self-rating plan.

Either the endorsement does or it does not subject the rate of premium for basic costs to the rating plan. If the rating plan requires the self-raters to pay a rate of premium for basic costs regardless of loss experience, the plan does comprehend a formula by which the rate of premium for basic costs may be computed, and it does subject the rate to the plan. Appellant's argument concerning the effect of the rating plan on the computation of the rate of premium for basic costs in and of itself disproves its initial and basic contention that the rate thereof is not subject to the plan.

Irrespective of the foregoing, appellant's interpretation of the self-rating plan is manifestly without merit. The extended analysis of the plan need not be examined in detail, since its interpretation is predicated on the meaning of paragraph I thereof, supra. Every other argument is merely appellant's conclusions regarding how the plan is consistent with its interpretation of paragraph I.

Appellant states that "its introductory scope of coverage * * * reiterates that * * * the plan is not applicable to the rate of premium for basic costs." What appellant means by this statement is not clear since it is later concluded that the 23% referred to in paragraphs XI and XV means 23% of the rate or rates of the regularly issued policy; but it is certain that the paragraph does not purport to delineate the coverage of the self-rating plan:

> "Every employer * * * bearing an endorsement providing that the rate or rates of premium * * * is an employer insuring * * * on a self-rating basis."

Patently, the sole and only purpose is to identify those who are self-raters.

Premium Tax Claim

Appellant further alleged in its complaint that the Commission had a mandatory duty to collect a statutory premium tax from the self-raters, which it failed to observe. Appellant relies on the concluding clause of the self-rating statute, supra, which states that the Commission "shall provide for a carrying charge, *premium tax* and a rate for the creation of a catastrophe reserve and reserves to meet anticipated and unexpected losses." Here again we cannot agree with appellant. If the legislature intended to delegate to the Commission the right to impose a tax, then the statute would clearly be unconstitutional as a delegation of legislative power. Art. III and Art. IX, § 1, Constitution of Arizona, A. R. S. See also Switzer v. City of Phoenix, 85 Ariz. —, 341 P. 2d 427.

The effect of appellant's argument is that in order not to make the words "premium tax" nugatory, we must not look alone to the self-rating statute to determine its meaning, but to other provisions of the Act. Appellant points in particular to paragraph 3 of subsection A, A. R. S. § 23-961. This latter section imposes a tax upon employers who are self-insurers in this language:

> "The employer shall pay a tax of two per cent of the premiums which would be paid by the employer if insured in the state fund. The tax shall not be less than two hundred fifty dollars per annum to be computed and collected by the commission and paid into the expense reserve of the compensation fund."

It is argued that the legislature could only have intended that the premium tax imposed by the self-rating statute be the same tax referred to in paragraph 3, subsection A, A. R. S. § 23-961.

We do not agree with appellant's assumption as to legislative intent. There is no reason to believe that the legisla-

ture intended to impose on the self-rater the same tax as upon the self-insurer. The purpose of the tax in lieu of premiums imposed on self-insurers is to equalize the burden of the expenses of the Commission in administering the Workmen's Compensation Law. This is not true in the case of the self-raters. The language of the self-rating statute requires the Commission to provide for a "carrying charge." Such carrying charge necessarily includes a loading for expenses of administration. Thus, while appellant's argument has superficially an element of plausibility, there is no possible way to conclude with certainty that this was the legislative intent simply because what is sought to be imposed by the one is not the same as that imposed by the other."

The prime requisite of any statute is certainty. This applies with equal force to a taxing statute. The act which imposes a tax must be certain, clear, and unambiguous. Duhame v. State Tax Commission, 65 Ariz. 268, 179 P. 2d 252, 171 A. L. R. 684. Since it is impossible to relate the words "premium tax" with certainty to any portion of the Workmen's Compensation Act, we are compelled to hold that the language thereof is an unconstitutional attempt to delegate to the Commission the right to impose a tax, and as such is void.

Employers Liability Act Coverage Claim

In addition to Workmen's Compensation coverage, the policy in question also provides coverage for liability imposed by the Employers Liability Law of this state. Protection is afforded to the extent of $10,000/$20,000 limits. The regularly issued policy provides:

> "* * * (Additional Employers Liability Insurance * * * may be procured by endorsement hereon and payment of premium therefor)."

The self-raters' policies contain an endorsement which deletes these limits, thereby affording to the self-raters unlimited protection.

It is appellant's position that although the contract requires increased premiums in return for such increased coverage, the self-raters receive this additional coverage without being required to pay additional premiums. Appellant argues that by its rules and regulations, the Industrial Commission has established the requisite rates and has published them in a certain table which appellant has included within its complaint. Appellant asks that the self-rater be compelled to pay the rate commensurate with the increased coverage which they have been afforded.

This, however, is clearly impossible. The table upon which appellant relies only includes the rates applicable to policies with liability limits from $10,000/$20,000 and up to $300,000/$500,000. Such rates are clearly inapplicable to the self-raters' contracts which contain no liability limits whatsoever. Even if the court had the statistical acumen to do so, it has no power to extend the table to encompass rates not included therein. The province of the court is not to set rates, but to review them. The motion to dismiss in relation to appellant's Employers Liability Act coverage claim was properly granted.

We note that in addition to the matters herein discussed, appellees urge that there are certain procedural errors which of themselves would be fatal to appellant's case. Although we agree in part, our conclusions above set forth are dispositive of the issues on the merits and render any further discussion unnecessary.

Judgment affirmed.

PHELPS, C. J., and JOHNSON, J., and E. R. THURMAN and FRED J. HYDER, Superior Court Judges, concur.

UDALL and BERNSTEIN, JJ., having disqualified, the Honorable E. R. THURMAN and FRED J. HYDER, Judges of the Superior Court, were called to sit in their stead and participated in the determination of this appeal.

APPENDIX B

Opinion on Rehearing of the Supreme Court of the State of Arizona of March 2, 1960

STRUCKMEYER, Chief Justice.

Appellant's motion for rehearing is granted to correct a possible erroneous impression left by a statement in this court's opinion issued July 15, 1959. Since we feel that it was necessary to grant a rehearing, we will also briefly discuss certain other aspects of appellant's motion.

We said in the statement of facts concerning the trial court's ruling in Cause No. 6414,

> "As to the corporate defendants, three of appellant's claims were dismissed and a part of the fourth."

This is incorrect. The corporate defendants were dismissed entirely from the fourth claim for relief.

In the light of A. R. S. § 23-946, that any person of interest dissatisfied with the order of the Commission may commence an action in the Superior Court *against the Commission* as defendant to set aside, vacate, or amend its order, the judgment dismissing the corporate defendants from the fourth claim for relief was proper. The statute limits the action to the Commission as defendant and it is appellant's exclusive remedy. However, other parties interested may properly intervene in the action if so desired.

Appellant urges that this court failed to treat its alternative to its basic costs claim predicated on the theory of restitution for unjust enrichment. Appellant, a corporation,

brought this action *in the right and on behalf of The Industrial Commission of Arizona*, urging that it had the same primary right to bring the action which the Commission possessed. (We did not pass on the issue raised by the form of appellant's unique action, preferring that the matter be disposed of on the merits.) Therefore, once having determined that a premium for basic costs was included within the operation of the self-rating plan, and it being admitted that the premium was paid, it became apparent that no claim for relief in restitution existed. The contract between the Commission and the self-raters was performed in full. 5 Corbin on Contracts, § 1104, p. 462.

Appellant urges that the court's opinion in part was predicated on an erroneous asumption of fact. This, appellant says, is because the contract construed by the court is not the contract between the Commission and the self-raters. It may be stated that the contract construed by this Court is the contract pleaded by appellant in the court below in both causes Nos. 6177 and 6414 as the contract between the Commission and the self-raters, and the same contract upon which the court below ruled in granting appellees' motion to dismiss. It is the same contract which was presented to this court on appeal as the contract between the Commission and the self-raters. Its meaning was argued in detail by appellant, both orally and in its briefs. If it is not the actual contract between the Commission and the self-raters, as is now for the first time asserted, it is not the concern of the court on rehearing. The contract which appellant asked to be construed was construed. Appellant has had its day in court, and a full day, indeed. Justice neither requires nor permits of more than this.

Appellant now urges that the court's construction of the self-rating endorsement and the self-rating (experience

rating) plan permits a "totally unbridled discretion to charge or not to charge" for basic costs, and hence destroys the constitutionality of the self-raters' statute, A. R. S. § 23-983, subd. E. It is to be confessed that we do not quite follow appellant's argument in this respect. If appellant is asserting that the self-rating statute as construed by the court is unconstitutional, then appellant will not be heard in an attempt to raise such an issue. The rule of law is well-established that one who has invoked the provision of a statute, sought to avail himself of its terms, and has been an actor thereunder, may not thereafter question its constitutionality. Haggard v. Industrial Commission, 71 Ariz. 91, 223 P. 2d 915; Stuart v. Norviel, 26 Ariz. 493, 226 P. 908.

If it be considered that the self-rating statute now permits arbitrary and capricious action by the Commission, appellant's position is patently unsound since, as pointed out in the original opinion, by the specific language of the statute the Commission directed to provide for the specified items of basic costs in fixing a rate of premium. The Commission does not have unbridled discretion to charge or not to charge at will for basic costs. It "shall" provide for a rate "to meet" the specified items and hence is manifestly prohibited from establishing a rate which will not meet the basic costs of the self raters.

If appellant's constitutional objection is that a statute, even though valid on its face, can be so administered as to be arbitrary and capricious, then the simple answer is that the statute, A. R. S. § 23-946, affords a method for obtaining judicial review of that administrative action. We find nothing unconstitutional in being given a method by which the Commission's orders may be attacked or in being required to pursue that method.

Finally, appellant has advanced other grounds for reversing this court's decision. They consist primarily of a reargument of its initial position. By long-established rule of court they are not grounds for reconsideration. Copper Queen Mining Co. v. Arizona Prince Copper Co., 2 Ariz. 169, 11 P. 396.

Except as herein modified, the original opinion is in all respects affirmed.

PHELPS and JOHNSON, JJ., and E. R. THURMAN and FRED J. HYDER, Superior Court Judges, concur.

UDALL and BERNSTEIN, Justices, having disqualified themselves, the Honorable E. R. THURMAN and the Honorable FRED J. HYDER, Judges of the Superior Court of Maricopa County, Arizona, were called to sit in their stead and participate in the determination of this appeal.

APPENDIX C

Opinion of the Superior Court of the State of Arizona, Maricopa County, in Superior Court Cause No. 81797

The plaintiff has brought a class action on behalf of The Industrial Commission of Arizona and the Commission's general class policyholders questioning the adequacy of the premiums collected by the Commission from its self-rating policyholders. The first cause of action is directed against the individual Commissioners, while the second and third causes of action are directed against various corporate defendants who carry self-rating policies issued by the Commission. Essentially the same allegations are set forth in all three causes of action. The plaintiff alleges that the premiums collected by the Commission from its self-rating policyholders have not been sufficient to cover certain "basic costs" incurred by the Commission for insuring said self-rating policyholders in the Workmen's Compensation Fund.

Plaintiff alleges that the formula of the Commission which fixed the premiums paid by the self-rating policyholders is illegal and void. And, as a result thereof, each of the defendants is indebted to the Commission in varying amounts totaling some eight and one half million dollars. In the first and second causes of action plaintiff asks for a declaratory judgment declaring the formula adopted by the Commission to be illegal and void and for judgments against defendants in the amounts therein set forth. In the third cause of action, plaintiff asks for a declaratory judgment declaring the respective interests of the general class and the self-rating policyholders in and to the monies contained in certain reserves and funds within the Compensation Fund.

Each of the defendants herein has filed motions to dismiss the amended complaint for lack of jurisdiction over the subject matter.

Defendants contend that plaintiff's action constitutes an attack upon an order of the Commission fixing premium rates, and further contend that plaintiffs are not only asking the court to declare such rates illegal, but are, in fact, asking the court to substitute new premium rates for those fixed by the Commission.

Since, in the opinion of the court, defendants' first contention is correct, it is unnecessary for the court to determine the validity of the second contention.

Section 56-908, A. C. A. 1939, establishes an administrative procedure for the review of the reasonableness and lawfulness of orders of the Commission. That section provides that any person who is aggrieved by an order of the Commission may file a verified petition with the Commission setting out specifically and in detail the order upon which a hearing is desired, and the reasons why such order is unreasonable and unlawful. Sections 56-909 provides [sic] that no action or proceeding to set aside or amend an order of the Commission or to enjoin the enforcement thereof shall be brought unless the plantiff first has applied to the Commission for a hearing thereon in the manner provided in Section 56-908.

In *Industrial Commission* v. *J. & J. Construction Co.*, 72 Ariz. 139, 231 P. 2d 762, the Arizona Supreme Court enforced these sections and emphasized the conclusive presumption of validity attaching to orders of the Commission when not attacked in the manner provided by statute.

The Court made the following statement:

> "We hold that the commission had jurisdiction to enter the order in question here and since defendant did not directly attack the order by petitioning the commission for a hearing thereon in the manner

> prescribed by section 56-908, the order, under section 56-909, was 'conclusively presumed to be just, reasonable, and lawful' and was not subject to defendant's collateral attack."

By virtue of Sections 56-914 and 56-915, any person dissatisfied with an order of the Commission may, after complying with the provisions of Section 56-908, file an action in the Superior Court to set aside, vacate or amend such order.

The same procedural problem was presented to the Arizone Supreme Court in *Haggard* v. *Industrial Commission*, 71 Ariz. 91, 223 P. 2d 915. There the plaintiff brought a class action challenging certain orders of the Commission and requested relief under the Declaratory Judgment Act. At page 919 of its opinion the Court stated as follows:

> "The first question is whether the Declaratory Judgment Act, being Art. 7, Ch. 27 A. C. A. 1939, is applicable to proceedings of this nature, or whether the only remedy of plaintiffs is the special procedure set forth in Secs. 56-914 to 56-918, A. C. A. 1939. A similar question has been raised in other jurisdictions and the majority of cases hold that under a special act like the Workmen's Compensation Act the exclusive remedy is that set forth in the Act, and that the Declaratory Judgment Act is not applicable. Moore v. Louisville Hydro-Elec. Co., 226 Ky., 20, 10 S. W. 2d 466; United States Fidelity & Guaranty Co. v. Thirion, 123 N. J. L. 29, 7 A. 2d 863; State ex rel. and to use of Public Service Commission v. Blair, 347 Mo. 220, 146 S. W. 2d 865; State ex rel. and to use of Public Service Commission v. Padberg, 346 Mo. 1133, 145 S. W. 2d 150.
>
> We think the question has already been settled for Arizona in S. H. Kress & Co. v. Superior Court, 66 Ariz. 67, 182 P. 2d 931, 933, where this court quoted approvingly from Employers' Liability Assur. Corp. v. Matlock, 151 Kan. 293, 98 P. 2d 456, 127 A. L. R.

461, the following language; 'This court has repeatedly asserted the well etablished principle that the workmen's compensation act establishes a procedure of its own, and that the procedure furnishes a remedy which is substantial, complete and exclusive in compensation cases. (Citing cases.)'

This action was brought to set aside an order of the commission, and the procedure to attack such orders is set forth in Secs. 56-914 to 56-918 of the act, as interpreted in O'Neill v. Martori, supra.
The trial court did not err in refusing to render judgment under the Declaratory Judgment Act."

Having failed to allege or show that it has invoked, pursued and exhausted the administrative remedies available to it under the Workmen's Compensation Act, plaintiff's action here must fail unless plaintiff can show that the provisions of Sections 56-908 and 56-909 are not applicable.

At the time the motion to dismiss was heard, plaintiff argued that the Commission had exceeded its jurisdiction and, therefore, a collateral attack was in order. The court has examined carefully Section 56-923 and finds that the Commission is specifically authorized and, therefore, has jurisdiction to establish a self-rating plan and fix rates and charges therefor, separate and distinct from those set for the general class policyholders.

Section 56-902 creates the State Compensation Fund and invests the Commission with full authority over the Fund. It provides that the Commission may do all things necessary in connection with the Fund or the compensation business carried on by the Commission.

In *Industrial Commission* v. *Arizona Power*, 37 Ariz. 425, 295 P. 305, the Commission had issued a policy with a self-rating endorsement there although the Workmen's Compensation Act at that time contained no provision for a self-rating plan. The Supreme Court held that although the

contract was ultra vires, the contract was not void. The Court stated as follows on page 310 of its opinion:

> "The commission is authorized to write insurance and it was therefore exercising a statutory authority when it wrote the policy for defendent. At most, the commission misinterpreted the extent of its powers and deviated from the form of policy prescribed. It exercises a rightful power in a wrong way. It was, however, acting within the scope of its authority when it wrote the policy."

There is no question that the Commission has been given the power to establish a self-rating plan and to fix rates and charges therefor. The power is not limited to the making of correct decisions. The principle enunciated in the *Arizona Power case*, supra, that jurisdiction does not depend upon proper exercise of authority, but, instead, upon whether authority exists, has been reaffirmed by the Arizona Supreme Court in *Arizona Public Service Co.* v. *Southern Union Gas Co.*, 76 Ariz. 373, 265 P. 2d 435. The following quotation from *Tube City Mining & Milling Co.* v. *Otterson*, 16 Ariz. 305, 146 P. 203, is cited at pages 440-441 of the *Southern Union Gas case*:

> "'The test of jurisdiction is whether or not the tribunal has power to enter upon the inquiry; not whether its conclusion in the course of it is right or wrong. Foltz v. (St. Louis & S. F.) Railway Co., (8 Cir.) 60 F. 316, 8 C. C. A. 635; Board of Commissioners (of Lake County) v. Platt, (8 Cir.) 79 F. 567, 25 C. C. A. 87. In the Foltz Case the conclusion of the court was expressed in these words:
>
> "'"Jurisdiction of the subject-matter" is the power to deal with the general abstract question to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. * * * *

> Nor is this jurisdiction limited to making correct decisions. It empowers the court to determine every issue within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties to it, unless reversed by writ of error or appeal, or impeached for fraud.' "

Plaintiff has invited the court's attention to the case of *Kennedy* v. *Morrow*, 77 Ariz. 152, 268 P. 2d 326, as authority for its contention that the order in question is subject to a collateral attack. It is the court's opinion that the ruling in the *Kennedy* case is not inconsistent with the court's ruling here. In the *Kennedy* case, fraud and deceit were alleged by the party making a collateral attack on a patent issued by the State Land Department. No such allegations are contained in plaintiff's complaint.

Notwithstanding the foregoing, plaintiff claims further that the provisions of the Administrative Procedure Act (Sections 4-701 through 4-712 A. C. A. 1939) and the Administrative Review Act (Sections 4-901 through 4-915 A. C. A. 1939) give it a right to a declaratory judgment action without the necessity of first exhausting its remedies before the Commission. Particularly, plaintiff relies upon that portion of Section 4-711 (Administrative Procedure Act) which states:

> "4-711. *Remedies to test validity of rules.*—Any person who is or may be affected by *any rule* may obtain a judicial declaration as to the validity of *such rule* by bringing an action for declaratory relief in the Superior Court of Maricopa County, in accordance with the provisions of Article 7, Chapter 27, Arizona Code of 1939 * * * " (Emphasis as supplied by plaintiff).

Plaintiff's position presents the problem of interpreting the scope and effect of the Administrative Procedure and Review Acts. In this connection the court is aided not only by recognized rules of statutory construction, but by several well reasoned and closely analogous opinions of the Arizona Supreme Court.

The possible relevance of the Administrative Review Act is quickly negatived by its own terms which exclude its applicability to an Act which, like the Workmen's Compensation Act, provides "* * * for judicial review of the agency decisions and prescribes a definite procedure for such review" (Section 4-903(a)).

The following rules of statutory construction stated in *Sutherland Statutory Construction* (3rd Edition, Horack) have been helpful to the court in determining the proper scope of the phrases "any rule" and "such rule" as set forth in Section 4-711. (The section references which follow refer to Sutherland's work.)

To determine what a particular provision, clause or word in an act means "* * * one must proceed as he would with any other composition—construe it with reference to the leading idea or purpose of the whole instrument" (Section 4703). To "* * * attempt to segregate any portion of an act and exclude arbitrarily from consideration any other portion of the act is almost certain to achieve a result other than that which the legislature intended * * *" (Section 4801). The purpose of an act constitutes "* * * an implied limitation on the sense of general terms * * *" (Section 4704). "The literal interpretation of words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature * * *. The intention prevails over the letter, and the letter must if possible be read so as to conform with the spirit of the act" (Section 4706). "Where the sense of the entire act requires that qualifying words apply to several preceding or even

succeeding sections, the word or phrase will not be restricted to its immediate antecedent" (Section 4921). The operative effect of provisos is that they "* * * will be applied according to the general legislative intent and will limit a single section or the entire act depending on what the legislature intended * * *" (Section 4932). "No presumption should arise from the mere location of the proviso that it is applicable only to the section in which it appears or to preceding sections" (Section 4934).

The Administrative Procedure Act drafted by the Legislative Committee of the Arizona State Bar Association and well publicized at the time, had a twofold purpose. The first purpose was to require administrative agencies to put rules of general application in writing, making them readily available and noticed to the public. Secondly, the act was designed to provide a speedy and effective method of testing the legality of such of those rules of general application as appear to be outside the scope of or contrary to statutory base upon which they must stand.

Legislative departments of the state were excluded from the scope of the Act (Section 4-701); the "rules" contemplated by it were limited to rules of general application (Section 4-703) as distinguished from decisions in contested cases applying a particular rule or rules to specific parties (Section 4-702), and " * * * any rule which establishes or fixes rates, prices or tariffs * * * " was specifically excluded from its operative effects (Section 4-706).

Thereafter follow several sections of the Act containing general or referential words or phrases. Section 4-705 requires an agency to file " * * * every rule adopted by it * * * "; Section 4-707 requires noticing of " * * * any rule * * * "; Section 4-708 provides for the emergency adoption of " * * * a rule * * * "; Section 4-709 provides that "No rule * * * " becomes effective unless certain procedural steps are taken.

In this frame of reference the phrases "any rule" and "such rule" in Section 4-711 cannot escape taking color from the other provisions of the Act. An order or orders fixing a premium rate for some 30 or 40 self-rating policyholders out of some 11,000 policyholders of the Commission could hardly be classed as a general rule. Even the provisions of the Workmen's Compensation Act would consider it as a "special order" (Section 56-930). It is the application of this special order fixing a premium rate for this limited group to which the plaintiff addresses its complaint. To read literally the referential words or phrases in the Administrative Procedure Act above set forth in Sections 4-705, 4-707, 4-708, 4-709 and 4-711 (the latter being relied upon by plaintiff) would do violence to and nullify all of the qualifying sections and provisions of that Act, and would completely eliminate the necessity for or operative effect of the Administrative Review Act. Further, such an interpretation would render the portion of Section 4-711 dealing with other grounds of invalidity (failure to file, etc.), useless surplusage.

This court cannot reasonably adopt any such interpretation. Clearly, the phrases "* * * any rule * * *" and "* * * such rule * * *" in Section 4-711 must refer only to rules within the purview of the Act, and these do not include specific decisions, not of general application, affecting only specific parties and dealing with the fixing of "* * * rates, prices or tariffs * * *" such as the order or orders here complained of by plaintiff.

The Arizona Supreme Court has frequently dealt with the subject of whether a later general statute, such as the Administrative Procedure Act, effects an implied repeal of an earlier specific statute or statutes, such as the provisions of the Workmen's Compensation Act setting forth procedures for administrative hearings prior to court review.

The court has been guided by the following rules: (1) Whether such repeals result must be determined in the light of legislative history and intent (*Sutherland*, Section 2007); (2) The presumption is strongly against such repeals (*Sutherland*, Section 2014); (3) This is particularly the case where, as here, the later statute is general in nature while the earlier statute is specific (*Sutherland*, Section 2021) and (4) The typical omnibus or general repealer sections of the later statute are to be ignored (*Sutherland*, Section 2013). See: *Hudson* v. *Brooks* (1945), 62 Ariz. 505, 158 P. 2d 661; *Shapley* v. *Frohmiller* (1946), 64 Ariz. 35, 165 P. 2d 306; *Haggard et al.* v. *Industrial Commission* (1950), supra; *Arizona Corporation Commission* v. *Catalina Foothills Estates* (1954), 78 Ariz. 245, 278 P. 2d 427, and cases cited therein.

As previously discussed, the Court, in the *Haggard case*, supra, considered the same procedural question posed in the case at bar. It refused to allow the later Declaratory Judgment Act to effect an implied repeal of the selfsame procedural provisions of the Workmen's Compensation Act with which the court is here dealing. And this in spite of the omnibus repealer provision of the Declaratory Judgment Act.

The court, therefore, concludes that on no theory can this court have jurisdiction to consider the merits of plaintiff's amended complaint until plaintiff has first exhausted its procedural remedies before the Industrial Commission.

The court feels constrained to advert to the fact that the things and matters complained of by plaintiff are of utmost importance. If the ultimate substantive statements of fact and law as set forth in plaintiff's amended complaint be true, appropriate action should be taken to remedy the situation. In this connection this court takes judicial notice of the fact that plaintiff has filed a verified petition and has been granted a hearing date by the Commission.

At that time the substantive charges made by plaintiff should be carefully considered and any necessary corrective measures should be taken. That is the procedure contemplated by law.

Done in open court this 4th day of June, 1955.

CHARLES C. BERNSTEIN
Judge

APPENDIX D

Opinion of the Superior Court of the State of Arizona, Maricopa County, in Superior Court Cause No. 86889

FIRST CAUSE OF ACTION

The order granting the motion of the defendants Hill, Nathan and Kleindienst to dismiss as to them individually is based upon the court's opinion as follows:

Said defendants were sued individually to recover a money judgment for amounts which plaintiff claimed should have been charged under rates fixed by defendants Hill, Nathan and Kleindienst acting in their capacities as members of the Industrial Commission of Arizona for payments of premiums by certain of the corporate defendants under insurance policies issued pursuant to statutory authority and requirements. Plaintiff's theory is that the formula for fixing such rates was erroneous.

The complaint does not allege fraud on the part of said defendants, but only that in authorizing a formula for determining rates of premiums on insurance policies issued to the corporate defendants, which formula plaintiff claims is contrary to law, said defendants are liable for the amounts which they failed to charge and collect pursuant to the formula plaintiff asserts is required.

Since said defendants were, when acting as Commissioners, exercising a part of the sovereign power of the state, in a matter involving discretion, and not acting as members of a board of directors of an association, incorporated or unincorporated, since no fraud is alleged, no personal judgment can be sustained against them; hence plaintiff's first cause of action should be dismissed.

SECOND CAUSE OF ACTION

For clarification, the court will refer to points raised by corporate defendants' motion to dismiss the second, third, and fourth causes of action by the same numerical classification used by them in their motions.

I.

A. Lack of jurisdiction over the subject matter.

1. Corporate defendants' point that plaintiff has failed to pursue its exclusive administrative remedy required by statute, insofar as any claim of plaintiff is based upon orders of the Industrial Commission fixing rates of premium for self-raters for any year except 1954, is well taken. Nowhere does it appear that plaintiff petitioned the Industrial Commission, pursuant to Secs. 23-945 et seq., ARS 1956 (or the applicable statutes in effect prior to the adoption of the 1956 Code), to determine the reasonableness or lawfulness of prior orders fixing such rates, except by a petition filed on April 27, 1955, after the Commission had issued its order fixing said rates for the year 1954.

2. Corporate defendants' point that plaintiff is limited to the statutory remedy set forth in Secs. 23-945 and 23-946, supra, is in the opinion of the court correct. The procedure and delimitation of the jurisdiction of the court to render judgment only as to the reasonableness or lawfulness of an order of the Commission, and to direct setting aside, vacating or amending such order, is clearly set forth in Secs. 23-946 and 23-947, ARS. 1956.

3. Insofar as plaintiff's complaint asks the court to enunciate a formula for fixing rates for insurance premiums, defendants' point is well taken. Plaintiff's prayer for a money judgment against corporate defendants is based on a specific formula which it contends must be used by the

Commission to fix the rate of insurance premium for self-raters. In asking the court to award a money judgment against corporate defendants based on one specific formula, plaintiff in effect asks the court to fix the rate. This is entirely without the jurisdiction of the court. The discretion involved in fixing the rates pursuant to the statute is vested in the Industrial Commission, subject only to review by the court, under the statutory procedure, for reasonableness or unlawfulness.

4. That orders of the Industrial Commission are not subject to attack under the Declaratory Judgment Act has been determined by the Arizona Supreme Court in *Haggard v. Industrial Commission*, 71 Ariz. 91, 223 Pac. (2) 915. Hence corporate defendants' 4th point is well taken.

B. Failure to State a Claim Upon Which Relief Can Be Granted.

1. Corporate defendants' claim that the action should be dismissed because another action is pending, by reason of the Supreme Court of Arizona's staying proceedings in Cause No. 81797, is without merit. Such stay of proceedings is provided by statute; if plaintiff's former action is without the jurisdiction of the court for failure to pursue its statutory remedy, defendants have suffered no harm. The matter is in suspended animation, and cannot be restored to active life unless plaintiff shows to the Supreme Court that the matters raised by plaintiff's petition to the Industrial Commission have been properly appealed, or until any of the parties to that action secure an order reinstating the appeal. It is inconceivable that the Supreme Court would permit the plaintiff to recover judgment in both actions; it is equally inconceivable that plaintiff should be foreclosed from pursuing the very statutory procedures defendants maintain must be followed, because he has attempted to

comply with them before urging his appeal in the first action.

2. Corporate defendants' contention that this is not a proper class action pursuant to Rule 23(b), Rules of Civil Procedure, is well taken. The Industrial Commission of Arizona, in the opinion of the court, is not an "association" within the meaning of said Rule 23(b), but is an agency of the state, created and maintained for the purpose of administering certain of the state's sovereign powers, and must proceed to act according to legislative authority as expressed or necessarily implied. For this reason plaintiff is not entitled to bring a secondary action as a shareholder of an association, pursuant to said Rule against such agency of the state, even though such agency in the exercise of those powers manifests some of the characteristics of an association of shareholders or stockholders. Conversely, neither plaintiff nor defendants are shareholders or stockholders of any "association" contemplated by Rule 23(b) in their relationship to the Commission.

This does not negate the theory that plaintiff might bring a class action pursuant to Rule 23(a) 3, based upon a claim that the order of the Commission is unreasonable or unlawful as regards plaintiff, and other policyholders in similar position.

3. Courts will presume that public officers constituting a public agency, exercise their statutory authority, unless the question of the unreasonableness or unlawfulness of their actions is raised by proper allegations of facts to the contrary. However, though plaintiff alleges the Commission's formula for fixing premium rates are "illegal", it does not allege facts to sustain the unreasonableness or unlawfulness thereof, and does not seek, except indirectly, such a ruling in its second cause of action.

4. Corporate defendants' point that the self-raters were required to pay by law only the amounts fixed by the Commission is also well taken. No allegation of fraud or conspiracy is alleged on the part of defendants in the fixing of the rates or charges, and defendants cannot therefore be required to answer for a rate which is presumed to be lawful.

5. With defendants' statement that neither plaintiff nor defendants have any interest in the compensation fund the court is in accord, if by "interest" is meant legal right to its control. As a matter of semantics, in the opinion of the court, it would be better stated that neither plaintiff nor defendants have any "right" to the fund, although all have an "interest" to the extent that rates charged for all premiums of insurance policies issued by the Commission shall be reasonable and lawful, so that they shall not be confiscatory as against any policyholder in relationship to other policyholders.

6. In the opinion of the court, the obligation created by reason of the issuance by the Industrial Commission of insurance policies here in question, is one created by statute, and therefore the one-year statute of limitations is applicable. The policy of insurance is contractual; the obligation of the contracting parties would not exist except by virtue of the statute.

THIRD CAUSE OF ACTION

Defendants' points hereunder have been discussed, supra. Since the Court holds that the orders of the Commission are not subject to attack by the Declaratory Judgment Act, which is the specific object of plaintiff's third cause of action, there is no need for further comment thereof.

FOURTH CAUSE OF ACTION

Plaintiff's fourth cause of action is a double-barrelled shotgun, in that it seeks the relief asked in the second and third causes of action, and in addition, proposed a trial de novo on appeal from the decision of the Industrial Commission upon the hearing of plaintiff's petition of April 27, 1955.

In the court's opinion, plaintiff is entitled to its appeal from the Commission's Decision under the procedure outlined in Secs. 23-946 and 23-947, ARS 1956, with regard to the reasonableness or lawfulness of the Commission's orders in fixing rates for the year 1954. Under its pleadings, there are allegations sufficient to raise the question.

> "Under the new rules of procedure the test as to whether a complaint is sufficient to withstand a motion to dismiss is whether enough is stated therein which, if true, would entitle plaintiff to some kind of relief on some theory. The court should not grant a motion to dismiss unless it appears certain that the plaintiff would be entitled to no relief under any state of facts which is susceptible of proof under the claim as stated." *Mackey et al.* v. *Spangler, et al.*, (Ariz.), just decided by Supreme Court of Arizona, not yet reported.

Dated, Phoenix, Arizona, this the 16th day of October, 1956.

LORNA E. LOCKWOOD
Judge

APPENDIX E

Judgments Below

MINUTE ENTRY OF MARCH 2, 1960 IN THE SUPREME COURT OF THE STATE OF ARIZONA

Order granting Appellant's Motion for Rehearing.

Order denying Appellant's Motion for Oral Argument on Rehearing. This case having been heretofore submitted and the Court having duly considered the same, and being now advised in the premises, files its decision. It is accordingly ordered that except as herein modified, the original opinion is in all respects affirmed.

MINUTE ENTRY OF JULY 21, 1959 IN THE SUPREME COURT OF THE STATE OF ARIZONA

This case having been heretofore submitted, and the Court having duly considered the same and being now advised in the premises, files its decision. It is accordingly Ordered that the judgment of the lower court be affirmed.

MINUTE ENTRY OF JUNE 4, 1955 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA, MARICOPA COUNTY, IN SUPERIOR COURT CAUSE NO. 81797

It is hereby Ordered that Defendants' Motion to Dismiss for Lack of Jurisdiction be granted, and the Clerk is authorized and directed to enter Judgment that Plaintiff's Amended Complaint be dismissed and that the Notice of Taking Depositions of Defendants, F. A. Nathan and A. R. Kleindienst and of John E. Gavin be vacated and that the order heretofore entered granting leave to take depositions be set aside.

MINUTE ENTRY OF OCTOBER 29, 1956 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA, MARICOPA COUNTY, IN SUPERIOR COURT CAUSE No. 86889

The Court having heretofore granted the motions to dismiss as to the plaintiffs' First, Second and Third Causes of Action and as to plaintiffs' Fourth cause of action only as to defendants described as corporate defendants, the Court finds that there is no just reason for delay in the proceedings in the above-entitled matter and that entry of judgment should be expressly directed.

NOW, THEREFORE, IT IS ORDERED judgment for the defendants, B. F. Hill, F. A. Nathan and A. R. Kleindienst, individually and as Commissioners of The Industrial Commission of Arizona on the First Cause of action of plaintiffs' complaint.

IT IS FURTHER ORDERED judgment for all of the defendants, B. F. Hill, F. A. Nathan, and A. R. Kleindienst, individually and as Commissioners of said The Industrial Commission of Arizona; The Industrial Commission of Arizona; Phelps Dodge Corporation; Castle Dome Copper Co., Inc.; Kennecott Copper Corporation; Copper Cities Mining Company; San Manuel Copper Corporation; The Garrett Corporation; Shattuck Denn Mining Corporation; The Arizona Power Company; Magma Copper Company; The Stearns Roger Manufacturing Company; Inspiration Consolidated Copper Company; The Pullman Company; American Smelting and Refining Company; Miami Copper Company; Apache Powder Company; Upper Verde Public Utilities Company; United States Smelting, Refining and Mining Company; International Smelting and Refining Company; The Eagle-Picher Company; Palmer Manufac-

turing Corporation; St. Anthony Mining & Development Company, Ltd.; Phelps Dodge Mercantile Company; Allison Steel Mfg. Company; Reynolds Metals Company; Standard Oil Company of California; Southwest Lumber Mills Company; Utah Construction Company; Salt River Valley Water Users' Association; Darr Aero Tech, Inc.; Saginaw & Manistee Lumber Company; Verde Tunnel and Smelter Railroad Company; Western Union Telegraph Company; Fisher Contracting Co.; and Mountain States Telephone and Telegraph Company, on the Second and Third Causes of action of plaintiffs' complaint.

IT IS FURTHER ORDERED judgment only as to the following named defendants, Phelps Dodge Corporation; Castle Dome Copper Co., Inc.; Kennecott Copper Corporation; Copper Cities Mining Company; San Manuel Copper Corporation; The Garrett Corporation; Shattuck Denn Mining Corporation; The Arizona Power Company; Magma Copper Company; The Stearns Roger Manufacturing Company; Inspiration Consolidated Copper Company; The Pullman Company; American Smelting and Refining Company; Miami Copper Company; Apache Powder Company; Upper Verde Public Utilities Company; United States Smelting, Refining and Mining Company; International Smelting and Refining Company; The Eagle-Picher Company; Palmer Manufacturing Corporation; St. Anthony Mining & Development Company, Ltd.; Phelps Dodge Mercantile Company; Allison Steel Mfg. Company; Reynolds Metals Company; Standard Oil Company of California; Southwest Lumber Mills Company; Utah Construction Company; Salt River Valley Water Users' Association; Darr Aero Tech, Inc.; Saginaw & Manistee Lumber Company; Verde Tunnel and Smelter Railroad Company; Western Union Telegraph Company; Fisher Contracting Co., and Mountain States Telephone and Telegraph Company, on the Fourth Cause of action of plaintiff's complaint.

APPENDIX F

Arizona Revised Statutes § 23-983

§ 23-983. Determination of rates, surplus and reserves

A. The state compensation fund shall be neither more nor less than self-supporting.

B. Employments affected by the provisions of this chapter shall be divided by the commission for the purpose of the state compensation fund into classes whose rates may be readjusted at times the commission determines. The commission may rearrange the classes by withdrawing any employment embraced in one class and transferring it wholly or in part to another class. Separate accounts shall be kept of the amounts collected and expended in each class for rate determination purposes, but for the payment of compensation and dividends the fund shall be one and indivisible.

C. The commission shall determine the hazards of the different classes of occupations or industries, fix the premiums therefor at the lowest rate consistent with the maintenance of a solvent compensation fund and the creation of a surplus and reserves, and may adopt a system of schedule rating in a manner to take account of the peculiar hazard of each individual risk.

D. The commission, in fixing rates, shall provide for expenses of administering the fund, disbursements on accounts of injuries and deaths of employees in each class, an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, reserves adequate to carry the class to maturity and other necessary reserves and surplus determined by the commission. The amount of

surplus and reserves shall be determined by the commission, but the catastrophe reserve shall not be less than one hundred thousand dollars.

E. The commission may in its discretion endorse on any of its regularly issued policies a self-rating plan, and may apply tentative rates, subject to modification in accordance with the loss experience of such risks, and shall provide for a carrying charge, premium tax and a rate for creation of a catastrophe reserve and reserves to meet anticipated and unexpected losses to be fixed by the commission.

APPENDIX G

Resolution of the Industrial Commission of Arizona dated May 17, 1948

RESOLVED, that an applicant for a self-rating policy must have an annual payroll of one million dollars, or more; applicant must also be equipped to provide its own hospital facilities, or have access to a private or public hospital within a reasonable distance of the operations of the applicant for a self-rating policy:

RESOLVED, FURTHER, that the adoption of this resolution does not in any way conflict with the discretionary powers delegated to the Commission to either approve or disapprove any application for self-rating policies as delegated to said Commission by Section 56-923, Article 9, Chapter 56, Arizona Code Annotated 1939, as amended.

APPENDIX H

Resolution of the Industrial Commission of Arizona dated October 4, 1952

WHEREAS it is the duty of the Commission to adopt such rules, regulations and policies as will provide protection for both the Workmen's Compensation Fund and the employees covered by the Workmen's Compensation Act, and

WHEREAS, when an application is made to the Commission by a policyholder for an endorsement on his policy of a self-rating plan, it is essential that consideration be given, before such endorsement is approved, to those matters which vitally affect both the fund and the employees of such policyholder, and

WHEREAS, among such considerations are:

1. that such employer have an annual payroll of at least Seven Hundred Fifty Thousand Dollars ($750,000.00);

2. that the applicant must be equipped to provide its own hospital facilities, or have access to a private or public hospital within a reasonable distance of the operations of the applicant;

3. that he file with the Commission a financial statement certified by a competent auditor, together with an appraisal of his assets and liabilities by such auditor, and a showing that he has sufficient assets of a liquid nature to adequately protect both the fund and his employees;

4. that the nature of the business is such that it is probable the same will have a reasonably stable, continuous life, and for this purpose previous operations outside of Arizona may be considered;

5. that there will be a reasonable distribution of the risk involved so that there will not exist a selection against the fund;

6. that the policyholder has the financial ability to (a) make a deposit with the Commission of such sums as the Commission may deem necessary for the protection of the employees, and (b) make a showing of the financial ability to provide for a "wash-out" policy upon completion of the policyholder's operations in Arizona.

NOW THEREFORE BE IT RESOLVED by the Arizona Industrial Commission that before any endorsement approving a self-rating plan is hereafter granted, the foregoing factors, together with all other material matters shall be considered by the Commission, and in the event any of said factors are not established to the satisfaction of the Commission, or if competent evidence discloses that because of any other particular facts or matters, approval of such self-rating plan may operate to the detriment of the fund or the interested employees, the Commission may in its discretion deny such application. Any resolution, or any part of any resolution heretofore adopted by the Commission in conflict with the provisions of this resolution, is hereby repealed.

FILE COPY

No. 251

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant,

vs.

B. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona; and THE INDUSTRIAL COMMISSION OF ARIZONA;

and

PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY; UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING, REFINING AND MINING COMPANY; INTERNATIONAL SMELTNG AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO.; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

MOTION OF APPELLEES TO DISMISS

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(Attorneys for Appellees continued on inside cover)

[redacted]

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IN THE

Supreme Court of the United States

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant,

vs.

B. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona; and THE INDUSTRIAL COMMISSION OF ARIZONA;

and

PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY; UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING, REFINING AND MINING COMPANY; INTERNATIONAL SMELTING AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO.; and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees.

No. 251
October
Term
1960

ON APPEAL FROM THE

SUPREME COURT OF THE STATE OF ARIZONA

MOTION TO DISMISS

Appellees move, pursuant to Paragraph 1(b) of Rule 16 of the Revised Rules of this Court, that the appeal be dismissed on the following grounds: (a) it does not present a substantial federal question, (b) the federal question sought to be reviewed was not timely or properly raised or expressly passed on, and (c) the judgment rests on an adequate non-federal basis.

STATEMENT OF THE CASE

I. Introduction

In the opinion of appellees the nature and theory of appellant's actions below are not adequately disclosed by the Statement of the Case appearing in the Jurisdictional Statement. Appellees, therefore, will at the outset set forth their statement of the case as it was presented to and considered by the Arizona Supreme Court[1].

The appeal grows out of two separate actions[2] involving the premium rates charged by the Industrial Commission of Arizona on self rating workmen's compensation insurance policies issued by the Commission.

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1 Except as otherwise indicated, numbers in parentheses refer to pages of Appellant's Abstract of Record before the Arizona Supreme Court. In addition, the following abbreviations are used throughout: "J. St." for Jurisdictional Statement; "O. B." and "R. B." for Appellant's Opening Brief and Reply Brief, respectively, in the Arizona Supreme Court; "A. B." for Corporate Appellees' Brief in the Arizona Supreme Court.

2 First Action—Cause No. 81797, Superior Court of Maricopa County
Cause No. 6177, Supreme Court of Arizona
Second Action—Cause No. 86889, Superior Court of Maricopa County
Cause No. 6414, Supreme Court of Arizona

In both actions, appellant, the holder of a general class workmen's compensation insurance policy issued by the Commission, purported to bring a class action in the right and on behalf of the Industrial Commission and other general class policyholders against the appellee self rating policyholders, the individual Commissioners and the Commission. By its actions, appellant sought to recover for and on behalf of the Commission money judgments against the self rating policyholders and the individual Commissioners. Appellant also sought to obtain for and on behalf of the Commission certain declaratory relief with respect to the right, title and interest of self rating policyholders in certain insurance reserves maintained by the Commission as well as declaratory relief regarding the formula used by the Commissioners in fixing rates on self rating policies. (3, 4, 53, 63, 66).

II. Proceedings Before Superior Court of Maricopa County

A. *The First Action*

The action was commenced on December 1, 1954. It specifically involved self rater premium rates for each of the years from 1948 through 1953, as well as the formula to be used in computing such rates in the future. (iv, 26, 27).

During the period covered by the complaint, self rater premium rates were determined under a retrospective experience rating plan, hereinafter referred to either as the Experience Rating Plan or the Self Rating Plan (227) (J. St. 9a, 11a). Briefly, this plan may be summarized as follows:

a. It provides for an initial or tentative premium rate at the commencement of each year. At the end of each year the initial rate is subject to retroactive modification upward or downward in accordance with the experience developed during that year. The initial or tentative rate as modified becomes the insured's ultimate or final rate for such year. (Self Rating Plan, § § II, XV, as amended, 219, 226);

b. The premium rate consists of two components: (i) the primary loss[3] portion of the rate, and (ii) a loading charge for expenses of administration and catastrophe and excess losses. During 1948-53, the percentages of the total premium rate represented by such components were as follows: (i) primary losses —76.50%, and (ii) loading charge—23.50%;

c. The retroactive modification process provided for in the plan results in a modification not only in the *amount* of the primary loss component but also in the *amount* of the loading charge. The end result is that the primary loss component reflects the *actual* primary losses occurring during the period and using the 1948-53 percentages represents 76.50% of the ultimate rate; the loading charge then represents 30.72% of the *actual* primary losses, or 23.50% of the ultimate or final rate. (Self Rating Plan, XV, as amended 226-227);

d. The Commission may also increase or decrease retroactively for such year the *excess* limit as well as the *percentage* of loading. (237, 238, 239).

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3 Primary losses are losses up to a specified amount per accident. The amount, e.g., $17,500.00 during 1948-53 is referred to as the excess limit. That portion of every loss over the excess limit is known as a "catastrophe or excess loss." If it be assumed that one accident in that same period resulted in a total loss of $20,000.00, $17,500.00 would be considered a "primary loss" and $2,500.00 as a "catastrophe" or excess loss. (226).

Appellant's actions did not involve the primary loss component of the self rater premium rate. By its action appellant contended, however, that the *loading charge* was excepted from the operation of the Self Rating Plan, and that under the terms of the self rating statute (ARS § 23-983E)[4] and the self rating policy the Commission was required to fix the *loading charge* on self-rating policies at 26.32% of manual rates[5] applicable to general class policyholders, (24, 25). This contention formed the basis for appellant's claims for a money judgment and declaratory relief in favor of the Industrial Commission of Arizona[6]. (42, 43, 53, 61-63, 65-66). Appellant's claims were denominated as its Basic Costs Claim and Alternative to Basic Costs Claim, the latter being predicated on a theory of unjust enrichment.

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4 All state statutes referred to herein are set forth in the Appendix hereto.

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5 Manual premium rates are expressed in terms of dollars per $100. of payroll for various job classifications established by the Commission in its rate manual. The manual rate is a prospective rate based upon the probability of loss in the respective job classifications. (14) (ARS § 23-983B, C). The rate cannot be retroactively increased regardless of the actual losses incurred. The policyholder may receive dividends under ARS § 23-986, however, if the Commission deems the loss experience justifies it. See *Industrial Commission. v. Arizona Power Company*, 37 Ariz. 425, 295 Pac. 305, for the comparison made by the court between a self rating and general class policy in interpreting the Self Rating Plan.

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6 Contrary to appellant's elaborate footnote analysis (J.St. 10, 11) purporting to show a $412,262.70 (J. St. 10 n. 15) self rater deficiency in the Catastrophe Reserve, appellant's *complaint* affirmatively establishes that the rates charged for 1948-53 more than covered self rater catastrophe losses. (Loading charge—$1,087,724.34; Catastrophe losses—$1,044,306.24) (41, 60). The complaint contains no allegations that expense items incurred by the Commission under self rater policies were the same amount in *dollars* as incurred under general class policies. It may also be noted that in *State Compensation Insurance Fund v. McConnell*, 46 Calif. 2d 330, 294 P. 2d 440, cited by appellant (J. St. 29) retrospective rating and premium discount plans were adopted as a result of the well recognized fact that expense items are lower in the case of large risks than in the case of small risks.

The Superior Court dismissed the action for lack of jurisdiction over the subject matter. The court held that the complaint constituted a collateral attack upon Commission rate orders and that appellant had failed to pursue and exhaust its administrative remedy before the Commission. (Memorandum Opinion—J. St. 20a-30a)

B. *The Second Action*

The second action was commenced on January 5, 1956, and set forth four causes of action. The first three causes merely constituted a refiling of the first action in its entirety. (255-264). The Fourth Cause purported to be an action for a judicial review of issues raised by appellant in a petition (72-142) filed with the Commission on April 28, 1955. (264-269). Such petition followed a resolution adopted by the Commission on April 1, 1955, revising the self rater formula by raising the excess limit and increasing the percentage of loading charge for the purpose of computing the self raters' ultimate premium rates for 1954. (209). Appellant's petition requested a hearing on the reasonableness and lawfulness of such formula, as well as other practices of the Commission in administering the self rater program and the compensation fund. (73-142).

The second action also raised appellant's so-called Employer's Liability Act Claim[7].

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7 Appellant's statement (J. St. 4, 5, 14) that self raters do not pay for Employer's Liability Act coverage in excess of $10,000/$20,000 limits is incorrect. For the purpose of fixing premium rates on a self rating policy, any loss under the employer's liability endorsement regardless of the amount is treated in the same manner as a compensation loss. The applicable rate is the rate provided in the self rating plan (243).

The Superior Court dismissed the first three causes of action in their entirety and dismissed the Fourth Cause as against the self raters but not as against the Industrial Commission. (J. St. 39a). To the extent that the Fourth Cause purported to seek a judicial review of self rater premium rates, the court held appellant was only entitled to a review of the reasonableness or lawfulness of the Commission's *1954* rate order. (J. St. 32a, 36a). The Fourth Cause of Action as so restricted is still pending in the Superior Court. The judgment of dismissal was based both on procedural and substantive grounds. (Memorandum Opinion—J. St. 31a-36a).

III. Proceedings Before The Arizona Supreme Court

The first and second actions were consolidated on appeal to the Arizona Supreme Court. Appellant stated (J. St. 17) that the Arizona Supreme Court disposed of the case on the merits. That statement is correct. The merits, however, did not, as appellant now attempts to imply, involve any determination with respect to the adequacy, reasonableness or discriminatory nature of the self rater premium rates, or of the classification of self raters as distinguished from general class policyholders. In fact, in presenting its case to the Arizona Supreme Court, appellant disclaimed any intention of attacking the rates and specifically assigned as error[8] the Superior Court's finding that the actions constituted an attack on a rate order. Appellant vigorously asserted that its case was one of contract brought in the right and on behalf of the Industrial Commis-

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8 Assignment No. 1 and Assignment No. 5, O.B. p. 7, 9.

sion (e.g., O. B. pp. 47-48, 65)[9]. It was upon this theory that appellant sought to avoid the procedural and substative grounds for dismissal adopted by the Superior Court—grounds which barred any action attacking the reasonableness and lawfulness of Commission orders unless brought in the manner provided under ARS § § 23-945, 23-946 and 23-947[10].

Finally, in response to appellees' defense that the complaint affirmatively alleged that the self rating policyholders had paid the premiums required under the contract, appellant restated quite clearly the issue presented by its Basic Costs and Employer's Liability Act Coverage Claims:

> "Appellees' 'paid bill' defense (SR Br. 49, 50) turns out to be their 'interpretation' of their 'plan' on the basis of which it is asserted that the self raters have paid 'precisely the amount called for under' the Commission-self rater contract (SR Br. 49). That, of course, is precisely the issue presented by appellant's Basic Costs and Employer's Liability Act Coverage Claims:
>
> *Have the self raters paid 'precisely the amount called for under' the Commission-self rater contract?*" (R. B. 46) (Emphasis supplied)

In resolving this issue, thus "precisely" defined by appellant, the Arizona Supreme Court construed the contract and ARS § 23-983E and found the self

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9 Compare appellant's analysis of its case as set forth in its Opening and Reply Briefs to the Arizona Supreme Court and the Statement of the Case in the Jurisdictional Statement filed with this Court.

10 See Memorandum Opinion of the Superior Court, Second Action, J. St. 32a, 36a.

raters had paid "precisely the amount called for under the Commission-self rater contract." Having so found, it was obvious that appellant's alternative claim based on unjust enrichment must also fail.[11] The court affirmed the judgments of dismissal entered by the Superior Court.

Then, "hoist with his own petar," appellant asserted out of the blue that in rejecting its claims the court had caused a violation of its constitutional rights to due process and equal protection of the laws under the fourteenth amendment. In its Memorandum in support of such Amended Motion, appellant, for the first time in the entire history of the litigation, attempted to raise an issue regarding an alleged unreasonable and arbitrary classification.

The Arizona Supreme Court refused to consider the alleged federal question. Such refusal was predicated on the grounds of estoppel and on the grounds that appellant had an adequate remedy under ARS § 23-946 to obtain a judicial review of acts of the Commission.

ARGUMENT

I. The Appeal Does Not Present A Substantial Federal Question

A. *There can be no federal question presented in this case.*

Appellant's claims as presented to and considered by the Arizona Supreme Court were secondary or deriva-

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11 The court specifically so stated in its Decision on Rehearing (J. St. 17a).

tive in nature.[12] The actions were brought in the right and on behalf of the Industrial Commission of Arizona (1, 4, 255), and sought relief solely for the Commission (53, 63, 258, 260). Therefore, whether or not appellant may assert the unconstitutionality of ARS § 23-983E, or the administrative application thereof, under the fourteenth amendment depends entirely on whether or not the Commission itself would have had that right. *Fahey v. Mallonee*, 332 U. S. 245,; Fletcher, *Cyclopedia of Corporations*, Perm, Ed. Sec. 5859.

The Industrial Commission of Arizona is an agency of the State, created and maintained for the purpose of administering certain of the State's sovereign powers. *Industrial Commission v. Arizona Power Company*, 37 Ariz. 425; 295 Pac. 305.

It is well established that an agency of a state cannot invoke the fourteenth amendment or any other provision of the federal constitution limiting state power. *Pawhuska v. Pawhuska Oil & Gas Company*, 250 U. S. 394; *Trenton v. New Jersey*, 262 U. S. 182; *Risty v. Chicago, R. I. & P. R. Co.*, 270 U. S. 378; *New Orleans v. New Orleans Waterworks*, 142 U. S. 79; *Black River Regulating Dist. v. Adirondack League Club*, 351 U.S. 922, and cases cited: Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Sec. 301.

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12 "As has been demonstrated, none of appellant's claims attack an 'order' of the Commission: on behalf of the Commission, appellant seeks enforcement of a contract, collection of a tax, and, alternatively, restitution on the basis of unjust enrichment. *The claims are secondary in nature. The primary right is in the Commission, which refused and refuses to assert them.*" (O. B. 57, 58) (Emphasis supplied) The collection of tax referred to by appellant is not involved in this appeal.

In the *Black River Regulating District* case, *supra*, this Court dismissed an appeal taken from the New York Court of Appeals where the New York court had held as follows:

> "A regulating district charged with authority to carry out the public purpose is an agency of the State depending for its existence and performing its functions subject to the control and direction of the State. "It has long been settled by Federal decisions that such powers are not protected by the due process clause of the Fourteenth Amendment to the Federal Constitution."

B. *No federal question is presented.*

The mere allegation of the existence of a federal question neither creates one nor suffices to give this Court appellate jurisdiction. *Equitable Life Assurance Society of the United States v. Brown*, 187 U. S. 308.

What is the federal question which appellant asserts? Throughout the Jurisdictional Statement this question is begged by merely asserting denial of equal protection of the laws and of due process. The only indication of a definition is in the reference (J. St. 4) to "an arbitrarily and unreasonably constituted class of insureds called self-raters". If there is a federal question, therefore, it must be one involving the creation of an unreasonable classification. And if this is the question, the record reveals it to be one of totally hindsighted fabrication.

Certainly the Arizona Supreme Court's rejection of appellant's claims by holding that the appellees paid the rates called for under the contract does not present

that or any other federal question. Nor does appellant's assertion that by the court's construction of the statute the Commission was given "totally unbridled discretion to charge or not to charge" the self raters for basic costs present any question. To this assertion the court replied quite clearly in its Opinion on Rehearing (J. St. 18a):

> "The Commission does not have unbridled discretion to charge or not to charge at will for basic costs. It 'shall' provide for a rate 'to meet' the specified items and hence is manifestly prohibited from establishing a rate which will not meet the basic costs of the self-raters.".

Appellees respectfully submit that, on the record before the Court, there just is no federal question presented. Appellant tries to create one by changing on appeal the entire theory upon which its actions were presented and decided. Suffice it to say, in the first place, that the record will not support the revised theory and, secondly, that the belated switch violates a principle well established by this Court. *Virginia Railway Company v. A. J. Mullins,* 217 U. S. 220.

II. The Alleged Federal Question Was Not Timely and Properly Raised

After five years of litigation appellant first attempted to inject a federal question into the case in its final move before the Arizona Supreme Court, i.e., in the filing of its Amended Motion for Rehearing. This was clearly in violation of the Arizona Procedural Rules. (Rule 5(c), Rules of the Supreme Court of Arizona). Appellant concedes that the Arizona Supreme Court did not decide its belated claims of un-

constitutionality (J. St. 21). The posture, therefore, of the asserted federal question is such as to require dismissal of the appeal. *Herndon v. Georgia*, 295 U. S. 441.

Appellant obviously recognizes this situation but attempts to bring itself within the exception set forth in *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313. The *Gehner* exception, however, is an extremely narrow one. There is no analogy whatsoever between the situation in the instant case and that in *Gehner*.

The *Gehner* exception is predicated entirely upon surprise. The case holds that when a federal question is first brought into the case by a state supreme court's decision which appellant was not reasonably bound to have anticipated, it is sufficiently "drawn in question", even though first raised in a petition for rehearing. Although appellant in *Gehner* sought a construction of a statute, it did not seek a construction on the precise issue as to whether or not its United States bonds were taxable. No one had ever contended that such bonds were taxable. Such issue presenting the federal question in that case did not arise until the state supreme court ruled imposing a tax on said bonds.

In contrast to *Gehner*, the express issue before the Arizona Supreme Court and the issue on which it ruled was whether or not the rates collected from the self raters for basic costs and employer's liability coverage were required under the self rating statute and self rating policy to be based upon the rates paid by general class policyholders. Appellees contended that the

long-standing practice[13] of the Commission in determining such rates in accordance with its self-rating plan was correct. It was over this precise issue that the battle was fought at all stages of the proceeding, i.e., before the Superior Court, the Commission, and the Arizona Supreme Court.

The issue as it concerned appellant's basic costs claim[14] was resolved by the Arizona Supreme Court's adoption of appellees' position that the experience rating plan was a part of the self rater policy, and that the premium for basic costs was subject to modification in accordance therewith and not required to be based on manual rates of general class policyholders.[15] On the portion of the issue involving the Employer's Liability Act Coverage Claim, the court held that the general class policyholder rates urged by appellant were clearly inapplicable and not a part of the contract between the Commission and the self rates. (J. St. 15a). This holding was in accord with appellees' contention[16]

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13 Such practice commenced with the adoption of the Plan in 1926 (See interpretation of self-rating plan in *Industrial Commission v. Arizona Power Company*, 37 Ariz. 425, 295 Pac. 305) and has continued for over three decades. (227, 238-239) Cf. *Herndon v. Georgia*, 295 U. S. 441.

14 See *supra*, p. 4, for a more complete statement of appellant's basic costs claim.

15 This holding was foreshadowed by the holdings in the proceedings before the Maricopa County Superior Court and the Commission. See Memorandum Opinion (J. St. 23a) wherein Judge Bernstein states: "The court has examined carefully Section 56-923 [ARS § 23-983E] and finds that the Commission is specifically authorized and, therefore, has jurisdiction to establish a self-rating plan and fix rates and charges therefor, separate and distinct from those set for the general class policyholders." See also Commission holding. (247).

16 See footnote 7, p. 5, *supra*. "The rates which are applicable to the self-rater policy are the rates determined and fixed by the Commission pursuant to its *experience rating plan*." (A. B. 14)

and the finding by the Commission that the rates relied upon by appellant were not a part of the self rater contract. (242, 243) (A. B. 14).

Thus it is quite clear that the decision of the Arizona Supreme Court involved only the specific issue presented to it by appellant. This issue was decided in favor of appellees in accordance with contentions urged by appellees throughout five years of litigation.

To say that under these circumstances appellant was not forewarned and could not reasonably have anticipated such a result, is incredible. It is as much as to say that it never could have been reasonably anticipated that appellant's contentions in these actions would not prevail. What appellant actually requires and seeks by asking the Court to review this case is the enunciation of an entirely new and startling "surprise" doctrine, i.e., that a litigant is not reasonably bound to anticipate a decision against him and, may therefore, in every instance of an adverse decision by the state supreme court thereafter and for the first time raise his federal constitutional claim. If a federal question exists in this case as a result of the Arizona Supreme Court's construction of the statute and the Industrial Commission's administration of it, as now belatedly claimed by appellant, surely that question existed just as much at the time appellant filed its original action as it did when the Arizona Supreme Court rendered it decision. As stated by the Arizona Supreme Court "appellant has had its day in court, and a full day, indeed. Justice neither requires nor permits of more than this." (J. St. 17a).

III. The Judgment Rests On An Adequate Non-Federal Basis

A. *The state court's application of estoppel furnishes an adequate non-federal basis for judgment.*

Even if it is assumed that the appeal presents a substantial federal question, and that the federal question was timely and properly raised, still this appeal must be dismissed because the judgment rests on an adequate non-federal basis.

When a state court's refusal to consider federal constitutional questions is based upon estoppel, the judgment rests on an adequate non-federal basis and an appeal to the United States Supreme Court must be dismissed. *Utley v. City of St. Petersburg, Florida,* 292 U. S. 106; *Enterprise Irrigation District v. Farmers' Mutual Canal Company,* 243 U. S. 157; *Hale v. Lewis,* 181 U. S. 473; *McSweeney v. Equitable Trust Co.,* 315 U. S. 785; *Twin Falls County, State of Idaho v. Henderson,* 305 U. S. 568; *Southern Nebraska Power Company v. Nebraska ex rel. Sorenson,* 299 U. S. 520; *Eustis v. Bolles,* 150 U. S. 361.

Appellant states that federal law determines "who" may raise a federal question. In considering the question of estoppel the issue involved is not "who" may raise a constitutional objection in the first instance, but, rather, whether or not a party having that right might lose it by his conduct or inaction. The resolution of that question involves an application of state law and the decision of the state court thereon furnishes on adequate non-federal basis for the decision. The decision in *International Steel & Iron Company v.*

National Surety Co., 297 U. S. 657 (cited J. St. 22) can furnish little comfort to appellant. There, not only was the factual situation completely different from that in the instant case but, in addition, the estoppel question was neither raised nor considered in the state court. Rather, the constitutional question was decided on the merits. On appeal, the United States Supreme Court recognized that if the defense of estoppel had been raised and considered in the state court, and held to be present, such holding would have furnished an adequate non-federal basis sufficient to support the decision.

As indicated previously, these being derivative or secondary actions, appellant's rights can rise no higher than and must be governed by the rights of the Commission. Therefore, if the Commission is estopped, appellant is estopped.

Here are the facts which were before the Arizona Supreme Court when it applied the estoppel: The Commission during the years in question had acted under the statute by entering into contracts pursuant thereto insuring the self raters. The Commission received benefits under these contracts in the form of premiums (22, 26). The self raters relied upon their policies and paid the premiums called for by their contract. (J. St. 17a). If the Commission were allowed to reverse its position retroactively and adopt the theory of appellant, the self rates would be prejudiced by their reliance upon the acts of the Commission in issuing policies and collecting premiums thereon in accordance with its, the Commission's, interpretation of the statute. Certainly the Commission by its prior conduct

has invoked the provisions of the self rater statute, has availed itself of its terms, and has been an actor thereunder to such an extent that it cannot now be allowed to deny the contracts it made pursuant thereto.

The Arizona court's decision invoking estoppel was based upon substantial grounds. Under such circumstances, as stated in *Enterprise Irrigation District v. Farmers' Mutual Canal Company*, 243 U. S. 157, this Court is "not at liberty to inquire whether it is right or wrong, but must accept it, as * * * [it accepts] other state decisions of non-federal questions."

B. *The state court's ruling that ARS § 23-946 provides the exclusive remedy for obtaining a judicial review of administrative actions of The Industrial Commission furnishes an adequate non-federal basis for judgment.*

Assuming, gain *arguendo* that a substantial federal question is presented and has been timely and properly raised for review by this Court, even so the appeal should be dismissed because the judgment rests on still another adequate non-federal basis, namely, appellant's failure to avail itself of the exclusive state remedy.

The Arizona Supreme Court did not pass upon any alleged federal question involving the Industrial Commission's administrative application of the self rater statute (ARS § 23-983E) on the grounds that ARS § 23-946 provided a method for obtaining judicial review of administrative action, and that such method was *exclusive* (J. St. 16a, 18a).

Appellant's argument (J. St. 24-26) recognizes that exhaustion of state remedies is a prerequisite to an appeal to this Court, but appellant contends the state remedy is inadequate. Appellant's contention in this regard is specifically directed toward the Commission's action in fixing self rater premium rates for the years 1948 through 1953. A look at the appropriate statutes quickly disposes of appellant's contention. ARS § 23-945 provides that any person aggrieved by an order of the Commission may obtain a hearing before the Commission; ARS § 23-946 provides for a judicial review of a Commission order after a hearing before the Commission; ARS § 23-948 provides for an appeal from the Superior Court to the State Supreme Court.

If appellant is now unable to obtain a judicial review of the 1948-53 rates, it is not because the remedy is inadequate but solely because appellant did not make a *timely* attempt to review the rates for any of those years in the manner required under ARS §§ 23-945 and 23-946[17]. In other words, appellant has lost its right to a review of the 1948-53 rates by neglecting to avail itself of the adequate state remedy[18].

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17 Although appellant's petition for hearing before the Commission was filed on April 28, 1955, following the Commission order of April 1, 1955, fixing a new formula for premium rates for 1954, it is affirmatively alleged in the complaint that appellant was fully aware of the matters of which it complained at least as far back as 1952 (4, 5).

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18 This clearly was the conclusion reached by the Superior Court as is shown by its Memorandum Opinion limiting the Fourth Cause of Action to review of the 1954 rate order, and by the following statement appearing in the Memorandum Opinion under the Second Cause of Action:
"Nowhere does it appear that plaintiff petitioned the Industrial Commission, pursuant to Secs. 23-945 et seq., ARS 1956 (or the applicable statutes in effect prior to the adoption of the 1956 Code), to determine the reasonableness or lawfulness of prior orders fixing such rates, except by a petition filed on April 27, 1955, after the Commission had issued its order fixing said rates for the year 1954." (J. St. 32a, 36a)

In affirming the judgement of the Superior Court with respect to the Fourth Cause of Action, the Arizona Supreme Court has impliedly, if not expressly, so held. Such holding is consistent with the previous decisions of the Arizona Supreme Court with respect to attacks on orders of the Industrial Commission. *Industrial Commission v. J. & J. Const. Co.*, 31 Ariz. 224, 231 P. 2d 762; *O'Neil v. Industrial Furnaces, Inc.*, 72 Ariz. 149, 231 P. 2d 768; *Holmes v. Osborne*, 57 Ariz. 522, 115 P. 2d 775. There is nothing novel in such theory, and the Arizona court's decision with respect to local statutes is binding upon this Court. *Utely v. St. Petersburg, Florida*, 292 U. S. 106; *First National Bank of Greeley v. Board of County Commissioners of the County of Weld*, 264 U. S. 450; *Bass v. Milledgville*, 295 U. S. 721.

Appellant's arguments (J. St. 24, 25) that a petition to the Commission would have resulted in an adverse decision, and that the Commission cannot render judgment for monies due the Fund, are frivolous. With reference to the first point, the state remedy does not end with a hearing before the Commission. This is evidenced in the instant case by the fact that appellant still has pending before the Superior Court an action for judicial review of the 1954 rates. As to the second point, the Commission, under ARS § 23-929, may cause actions to be initiated to collect any monies due the Compensation Fund. Accordingly, if appellant had invoked and pursued its state remedy and this had resulted in new rates being established, the Commission, if necessary, could have initiated actions to collect the premiums due the Compensation Fund.

It is clear that the statutes of Arizona have at all times provided an adequate remedy to protect appellant against any alleged arbitrary and capricious acts of the Industrial Commission. The refusal of the Arizona Supreme Court to consider appellant's objection with respect to Commission action rested upon an adequate non-federal basis. *Mellan Co. v. McCafferty*, 329 U. S. 134; *Copperweld Steel Company v. Industrial Commission of Ohio*, 324 U. S. 779; *Phyle v. Duffy*, 334 U. S. 862.

CONCLUSION

For the reasons and upon the grounds set forth herein Appellees respectfully submit that the appeal should be dismissed.

Respectfully submitted,

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APPENDIX

Text of Arizona Statutes Cited in Appellees' Motion to Dismiss

ARS §23-929 (formerly §56-969, A.C.A., 1939)

"Upon request of the commission the attorney general, or under his direction the county attorney of the proper county, shall institute and prosecute the necessary actions or proceedings for the enforcement of the provisions of this chapter, or for recovery of money due the state compensation fund or accident benefit fund, or for any penalty provided for in this chapter, and shall prosecute or defend all actions or proceedings brought by or against the commission, or the members thereof in their official capacity. The commission may compromise any action brought under this chapter."

ARS §23-945 (formerly §56-908 A.C.A., 1939)

"A. Any employer or other person interested in or affected by an order of the commission may petition for a hearing on the reasonableness and lawfulness of such order by a verified petition filed with the commission. The petition shall set forth specifically and in detail the order upon which a hearing is desired, the reasons why the order is unreasonable or unlawful and the issue to be considered by the commission on the hearing. Objections other than those set forth in the petition are deemed finally waived.

B. Upon receipt of the petition, if the issue raised in the petition has theretofore been adequately considered, the commission shall confirm, without hearing, its previous determination. If a hearing is necessary to determine the issue raised, the commission shall order a hearing thereon at such time as it prescribes. Notice of the time and place of hearing shall be given the petitioner and such other persons as the commission finds directly interested in the decision.

C. Upon the hearing, if it is found that the order complained of is unlawful or unreasonable, the commission shall substitute therefor a reasonable and lawful order, and may grant further time reasonably necessary for compliance with its order."

ARS §23-946 (formerly §56-909 in part, §56-914, A.C.A., 1939)

"A. Any person in interest dissatisfied with an order of the commission may commence an action in the superior court of the county where the property, plant or place of employment affected by the order is located against the commission as defendant to set aside, vacate or amend the order, on the ground that the order is unreasonable or unlawful, and the superior court shall have exclusive jurisdiction thereof. The commission shall be served with summons as in civil actions.

B. The answer of the commission shall be filed within ten days after service of summons upon it. The commission shall file with the answer a certified transcript of its record in the matter, whereupon the action shall be at issue and shall be advanced for trial by the

court upon application of either party to the earliest possible date.

C. No action or proceeding to set aside, amend or enjoin enforcement of an order of the commission shall be brought unless the petitioner has applied to the commission for a hearing thereon as provided by §23-945 and in such petition has raised every issue in the action."

ARS §23-947 (formerly §56-915 A.C.A., 1939)

"A. If upon the trial provided for in §23-946, it appears that all issues arising in the action have not theretofore been presented to the commission in the petition for a hearing as to the reasonableness and lawfulness of the order, or that the commission has not had ample opportunity to hear and determine the issued raised in the action, or has not in fact heard and determined the issues raised, the court shall, before rendering judgment, unless the parties stipulate to the contrary, transmit to the commission a full statement of such issues not adequately considered, and shall stay further proceedings in the action for fifteen days from the date of the transmission, and may thereafter grant such further stay as is necessary.

B. Upon receipt of the statement from the court as provided in subsection A, the commission shall consider the issues not theretofore considered, and may alter, modify, amend or rescind its order complained of, and shall, within ten days from receipt of the statement, report its order thereon to the court. The court shall thereupon order the pleading to be amended to

raise the issues resulting from the alteration, modification, amendment or rescission of the commission's order, and thereafter proceed as in other civil actions."

ARS §23-948 (formerly §56-916 A.C.A., 1939)

"No court of this state, except the superior court and the supreme court on appeal, shall have jurisdiction to review, vacate, set aside, reverse, revise, correct, amend or annul any order of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its duties, but a writ of mandamus may issue from the supreme court to the commission in proper cases, and an appeal may be taken from the superior court to the supreme court in all cases.".

ARS §23-983 (formerly §56-923 in part, A.C.A., 1939)

"A. The state compensation fund shall be neither more nor less than self-supporting.

B. Employments affected by the provisions of this chapter shall be divided by the commission for the purpose of the state compensation fund into classes whose rates may be readjusted at times the commission determines. The commission may rearrange the classes by withdrawing any employment embraced in one class and transferring it wholly or in part to another class. Separate accounts shall be kept of the amounts collected and expended in each class for rate determination purposes, but for the payment of compensation and dividends the fund shall be one and indivisible.

C. The commission shall determine the hazards of the different classes of occupations or industries, fix

the premiums therefor at the lowest rate consistent with the maintenance of a solvent compensation fund and the creation of a surplus and reserves, and may adopt a system of schedule rating in a manner to take account of the peculiar hazard of each individual risk.

D. The commission, in fixing rates, shall provide for expenses of administering the fund, disbursements on accounts of injuries and deaths of employees in each class, an adequate catastrophe reserve, reserves adequate to meet anticipated and unexpected losses, reserves adequate to carry the class to maturity and other necessary reserves and surplus determined by the commission. The amount of surplus and reserves shall be determined by the commission, but the catastrophe reserve shall not be less than one hundred thousand dollars.

E. The commission may in its discretion endorse on any of its regularly issued policies a self-rating plan, and may apply tentative rates, subject to modification in accordance with the loss experience of such risks, and shall provide for a carrying charge, premium tax and a rate for creation of a catastrophe reserve and reserves to meet anticipated and unexpected losses to be fixed by the commission."

ARS §23-986 (formerly §56-924, A.C.A., 1939)

"Annually, within six months after the close of each fiscal year, if there exists in the state compensation fund an excess of assets over liabilities and a reasonable surplus, such liabilities to include the necessary reserves including the catastrophe reserve, and such

excess may be safely divided, the commission shall declare a dividend in such method or manner as the rules and regulations of the commission provide to those employers who have paid premiums into the state compensation fund and accident benefit fund in excess of liabilities chargeable to them in those funds for that year. In determining the amount or proportion of the balance to which employers are entitled as dividends, the commission shall give consideration to the prior paid premiums and accident experience of each individual employer during the dividend year."

Rule 5(c), Rules of the Supreme Court of Arizona

"1. Assignments of error shall distinctly specify each ground of error relied upon and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for new trial, with other rulings, or in any motion, or in a statement of facts, or otherwise in the record, it shall nevertheless be referred to in the assignments of error, or it will be deemed waived.

2. If the error assigned is that the court overruled a motion for new trial and the motion was based on more than one ground, the assignment of error will not be considered as distinct and specific by this court unless each ground is specially and distinctly stated in the assignment of error.

3. An objection to the ruling or action of the trial court will be deemed waived in this court unless it has been assigned as error in the manner provided by this Rule.

4. If the error assigned is the giving of instructions to the jury by the trial court, the appellant shall set forth in his statement of the law applicable to the case or to any particular fact or facts in the case, specifically in what way the instruction complained of is erroneous.

5. If the refusal to give an instruction requested by appellant in the trial court is assigned as error, the assignment shall state the applicability of such instruction to a fact or facts in the case.

6. The assignments of error may only be amended by leave of court and upon such terms as this court prescribes."

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Office Supreme Court, U.S.
FILED
OCT 27 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 251

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant,

vs.

E. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona, and THE INDUSTRIAL COMMISSION OF ARIZONA,

and

PHELPS DODGE CORPORATION, CASTLE DOME COPPER CO., INC., KENNECOTT COPPER CORPORATION, COPPER CITIES MINING COMPANY, SAN MANUEL COPPER CORPORATION, THE GARRETT CORPORATION, SHATTUCK DENN MINING CORPORATION, THE ARIZONA POWER COMPANY, MAGMA COPPER COMPANY, THE STEARNS ROGER MANUFACTURING COMPANY, INSPIRATION CONSOLIDATED COPPER COMPANY, THE PULLMAN COMPANY, AMERICAN SMELTING AND REFINING COMPANY, MIAMI COPPER COMPANY, APACHE POWDER COMPANY, UPPER VERDE PUBLIC UTILITIES COMPANY, UNITED STATES SMELTING, REFINING AND MINING COMPANY, INTERNATIONAL SMELTING AND REFINING COMPANY, THE EAGLE-PICHER COMPANY, PALMER MANUFACTURING CORPORATION, ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD., PHELPS DODGE MERCANTILE COMPANY, ALLISON STEEL MFG. COMPANY, REYNOLDS METALS COMPANY, STANDARD OIL COMPANY OF CALIFORNIA, SOUTHWEST LUMBER MILLS COMPANY, UTAH CONSTRUCTION COMPANY, SALT RIVER VALLEY WATER USERS' ASSOCIATION, DARR AERO TECH, INC., SAGINAW & MANISTEE LUMBER COMPANY, VERDE TUNNEL AND SMELTER RAILROAD COMPANY, WESTERN UNION TELEGRAPH COMPANY, FISHER CONTRACTING CO., and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

CLIMATE CONTROL, INC., a corporation, in the right and on behalf of THE INDUSTRIAL COMMISSION OF ARIZONA, and the policyholders of said The Industrial Commission of Arizona,

Plaintiff-Appellant,

vs.

B. F. HILL, F. A. NATHAN, and A. R. KLEINDIENST, individually and as Commissioners of said The Industrial Commission of Arizona; and THE INDUSTRIAL COMMISSION OF ARIZONA;

and

PHELPS DODGE CORPORATION; CASTLE DOME COPPER CO., INC.; KENNECOTT COPPER CORPORATION; COPPER CITIES MINING COMPANY; SAN MANUEL COPPER CORPORATION; THE GARRETT CORPORATION; SHATTUCK DENN MINING CORPORATION; THE ARIZONA POWER COMPANY; MAGMA COPPER COMPANY; THE STEARNS ROGER MANUFACTURING COMPANY; INSPIRATION CONSOLIDATED COPPER COMPANY; THE PULLMAN COMPANY; AMERICAN SMELTING AND REFINING COMPANY; MIAMI COPPER COMPANY; APACHE POWDER COMPANY; UPPER VERDE PUBLIC UTILITIES COMPANY; UNITED STATES SMELTING, REFINING AND MINING COMPANY; INTERNATIONAL SMELTING AND REFINING COMPANY; THE EAGLE-PICHER COMPANY; PALMER MANUFACTURING CORPORATION; ST. ANTHONY MINING & DEVELOPMENT COMPANY, LTD.; PHELPS DODGE MERCANTILE COMPANY; ALLISON STEEL MFG. COMPANY; REYNOLDS METALS COMPANY; STANDARD OIL COMPANY OF CALIFORNIA; SOUTHWEST LUMBER MILLS COMPANY; UTAH CONSTRUCTION COMPANY; SALT RIVER VALLEY WATER USERS' ASSOCIATION; DARR AERO TECH, INC.; SAGINAW & MANISTEE LUMBER COMPANY; VERDE TUNNEL AND SMELTER RAILROAD COMPANY; WESTERN UNION TELEGRAPH COMPANY; FISHER CONTRACTING CO., and MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY;

Defendants-Appellees.

No. 251

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

We wish to correct at the very outset appellees' statement that appellant's Federal constitutional claims are "hindsighted fabrication" (M. D. 10).[1] Appellant repeatedly urged in the Arizona courts that the construction of the Self-Rating Statute (A. R. S. § 23-983(E)), Plan and Policy urged by the appellees, if adopted, would deprive the general policyholders of their constitutional rights. Thus, in its Statement of Position filed with the Superior Court in the second action, appellant stated:

> "It is Climate Control's unequivocal position that were this statute given the distorted construction required in order to authorize the unprecedented insurance giveaway program that is the self-rater plan as administered, the statute is unconstitutional as constituting a violation of the general class' right to due process" (369).

Appellant further stated in its brief before the Arizona Supreme Court on the original argument:

> "[W]ere the self-rating statute as embodied into the Commission-self rater contract to be construed in such a manner as to permit the self raters to avoid payment of their 'regularly issued' policy rate or rates for basic costs and yet receive like, equal, and identical insurance benefits from all monies raised by the Commission through application to all other policyholders of the rate or rates for basic costs, there would be raised a serious question as to whether such contract was a violation under the federal and state constitutions of the right of all other policyholders to equal protection of the laws and the prohibition against the taking of property without due process" (p. 29).

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[1]The Motion to Dismiss is cited as "M. D." The Jurisdictional Statement is cited as "J. S." Otherwise, citations are as set forth in J. S. 2n. 1.

I

THERE IS NO MERIT IN APPELLEES' UNSUPPORTED STATEMENT THAT THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The first so-called "Argument" of appellees' Motion is entitled: "The Appeal Does Not Present A Substantial Federal Question" (M. D. 8-11). However, appellees have not made in this section or in any other part of their Motion, with the exception of two footnote comments,[2] a single argument addressed to the merits of appellant's constitutional claims.

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[2]In footnote 6, page 4, appellees attempt to convert a deficiency of $412,262.70 in their account in the Catastrophe Reserve during 1948-53 (J. S. 10n. 15) into a surplus of $43,418.10 by failing to charge against the $1,087,724.34 which they paid for basic costs any contribution for administrative expenses. Appellees attempt to justify this omission on the ground that the complaint does not allege that administrative expenses incurred under self-rating policies were the same dollar amount as those incurred under general policies. But the important fact is that, as alleged in the complaint, the Commission actually appropriated for its administrative expense the same percentage (.0931) of all premiums received from the general policyholders *and* the self-raters (22; J. S. 8). In the case of the self-raters the appropriation amounted to $429,199.51 (37; J. S. 10n. 15). The balance of the self-raters' loading charge was not, therefore, sufficient to cover their catastrophe losses (J. S. 10n. 15).

In footnote 7, page 5, appellees contend that the self-raters pay for Employers' Liability Act coverage above $10,000/20,000, because of the alleged fact that self-raters' employers' liability losses are treated as primary or catastrophe losses, as the case may be, under the Self-Rating Plan. Appellees' assertion is an attempt to rebut an allegation of fact in appellant's complaint to the effect that the self-raters do not pay for the unlimited coverage they receive above $10,000/20,000 (128, 265). On appeal to this Court from a state court decision dismissing the complaint, all factual allegations of the complaint are accepted as true. *Postal Telegraph-Cable Co.* v. *City of Newport*, 247 U. S. 464, 474 (1918). The Arizona Supreme Court accepted this factual allegation as correct (J. S. 14a-15a).

The appellees ignore the fact—basic to appellant's challenges of unconstitutionality—that the rates concededly paid by the self-raters and called for under the Self-Rating policy, as construed by the Arizona Supreme Court, were substantially and unreasonably discriminatory against general policyholders (J. S. 8-14, 17-18, 26-29). Nor do appellees even attempt to rebut appellant's contention that the discrimination is not justified by any reasonable distinction between the two classes of policyholders (J. S. 11-13, 27-29).[3] Rather, appellees direct their argument on the merits to two points not in issue on this appeal.[4]

II

THE APPELLANT MAY RAISE ITS FEDERAL CONSTITUTIONAL CHALLENGES EVEN ASSUMING ARGUENDO THAT THE COMMISSION MAY NOT RAISE THEM.

On the erroneous premise that these suits are brought on behalf of the Commission and seek relief solely for the

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[3] In footnote 6, page 4, appellees suggest they are entitled to a lower premium because expense items are lower in the case of larger risks. This emphasizes the arbitrary nature of the discrimination in favor of the self-raters. The case cited by appellees and other authorities show that the size of the premium is the generally accepted measure of the risk. *State Compensation Ins. Fund* v. *McConnell*, 46 Cal. 2d 330, 294 P. 2d 440 (1956); Riesenfeld, *Basic Problems in the Administration of Workmen's Compensation*, 36 MINN. L. REV. 119, 141-42 (1952); Kulp, *The Rate-Making Process in Property and Casualty Insurance*, 15 LAW & CONTEMP. PROB., 493, 518-19 (1950). As alleged in the complaint, there is an extreme spread in the size of premiums paid by the self-raters, e.g., in 1953 self-rater premiums varied from a high of $107,364.35 to a low of $125.00 (37).

[4] Thus appellees assert the Arizona Supreme Court's holding that "the appellees paid the rates called for under the contract" does not present any Federal question (M. D. 10-11). That is not the constitutional issue raised by the Jurisdictional Statement or appellant's application for rehearing (J. S. 8-14, 17-18, 26-29; App. Mem. 31-37).

Appellees argue yet another point not made in the Jurisdictional Statement (although raised on rehearing), namely, that the Self-Rating Statute is invalid because it gives the Commission unbridled discretion as to whether to charge the self-raters anything for basic costs (compare M. D. 11 with J. S. 8-14, 17-18, 26-29; App. Mem. 31-37).

Commission, appellees argue that appellant is precluded from asserting its constitutional claims because the Commission could not assert them (M. D. 8-10). But, as the title and allegations of the complaints in both actions expressly state, appellant is suing in the right and on behalf of the policyholders of the Commission as well as the Commission itself (1, 4, 255, 257); and relief is demanded in both suits on behalf of the general policyholders and the Commission, including a general prayer for such other and further relief as might be deemed proper (53-54, 63-64, 67, 258-60, 262, 264, 266-69).[5] This relief, if granted, would consist of, among other things, a declaration that the Self-Rating Plan is invalid in regard to the computation of the self-raters' basic costs charge and a determination of the rights of general policyholders and self-raters in the Catastrophe Reserve (53, 63, 258, 260, 266-67). Obviously, such relief is sought solely for the benefit of the general policyholders, of which appellant is one.

It is clear beyond question that this appeal presents the issue of whether appellant and other general policyholders have been deprived of their, and not the Commission's, right to equal protection and due process of law under the Fourteenth Amendment.[6]

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[5]The declaratory relief demanded by appellant in the first and second causes of action in both suits and in the fourth cause of action in the second suit is sought on behalf of the general policyholders as well as the Commission (53, 63, 258, 260, 266-69). In the instances where appellant demanded relief solely on behalf of the Commission, it expressly limited its prayer. See, e.g., the monetary relief demanded at (53) and the declaratory relief demanded at (66).

[6]J. S. 2, 4-5, 8-14, 17-18, 24, 26-29; Appellant's Amended Motion for Rehearing in the Arizona Supreme Court 1-2; App. Mem. 31-37.

III

THE APPEAL MAY NOT BE DISMISSED ON THE GROUND THAT THE FEDERAL QUESTIONS WERE NOT RAISED PROPERLY OR IN TIME.

The Arizona Supreme Court did not base its refusal to consider appellant's Federal constitutional points on the ground that they were not raised in time under Arizona practice (J. S. 17a-18a). The court's refusal to consider appellant's constitutional claims was based solely on estoppel and failure to exhaust statutory procedure, neither of which is an adequate state ground for dismissal of this appeal (see pp. 8-17 *infra*). The appellees may not properly argue for dismissal of the appeal on state grounds not relied upon by the state supreme court. *Steele* v. *Louisville & N. R. R.*, 323 U. S. 192, 197 n. 1 (1944); *Grayson* v. *Harris*, 267 U. S. 352, 358 (1925). Moreover, appellees did not even present the question of untimeliness to the Arizona Supreme Court, but rather argued the Federal questions on the merits.[7] See *Great No. Ry.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 366-67 (1932).

Still further, the fact that the Arizona Supreme Court reviewed on rehearing the merits of appellant's contention based upon the state constitutional doctrine of separation of powers (in regard to the Commission's unlimited discretion whether to charge the self-raters any sum for basic costs) precludes appellees from contending that appellant did not seasonably raise its "kindred" argument that the manner in which the Commission discriminated in favor of the self-raters in charging for basic costs violated the equal protection and due process clauses of the Fourteenth

[7] See Corporate Appellees' Objections to Appellant's Motion and Amended Motion for Rehearing 1-2 and Memorandum in Support thereof 12-17, 21-24.

Amendment (App. Mem. 31-37; J. S. 6-11, 17-18). *Williams* v. *Georgia*, 349 U. S. 375, 383 (1955).[8]

In view of the foregoing, appellant need not rely on the "surprise" doctrine which becomes relevant only when the state court refuses to consider a Federal question, raised for the first time on rehearing, on the ground that it was not timely raised or when, after the appellee argues untimeliness, the state court simply denies rehearing. See *Great No. Ry.* v. *Sunburst Oil & Ref. Co.*, p. 6 *supra*. However, under the facts of the instant case, the "surprise" doctrine would apply since the appellant was not "reasonably bound to anticipate" the Arizona Supreme Court's resolution of the novel issues involved in the construction, for the first time, of the Self-Rating Statute, Policy and Plan.[9]

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[8]Cf. *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 24-25 (1931); *Grannis* v. *Ordean*, 234 U. S. 385, 392 (1914) and *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 158 (1911) which held that the Court has jurisdiction of a Federal question raised for the first time in a motion for rehearing when the state court grants rehearing and considers the Federal question.

[9]See J. S. 20-21; cf. *International Steel & Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 665 n. 6 (1936) (suggesting that, on almost identical facts, the "surprise doctrine" applies).

The language from the Superior Court decision which appellees claim should have forewarned appellant of the Arizona Supreme Court decision (M. D. 13n. 15) does not deal with the construction of the Self-Rating Policy or Plan or with the issue of whether under ARS 23-983 (E) the Commission has authority to base the self-raters' loading charge on actual primary losses (J. S. 2a-12a).

Contrary to appellees' insinuation (M. D. 13n. 13), *Industrial Commission* v. *Arizona Power Co.*, 37 Ariz. 425, 295 Pac. 305 (1931) could not have forewarned appellant of the Arizona court's construction of the Self-Rating Statute, Plan and Policy inasmuch as the Statute had not yet been enacted (J. S. 2a-3a). The court held in *Arizona Power* that the self-rating policy before it (similar to that presently issued) was *ultra vires* in the absence of an authorizing statute. The computation of the self-raters' loading charge was not at issue. The case of *Herndon* v. *Georgia*, 295 U. S. 441 (1935), cited by appellees (M. D. 12), is clearly distinguishable since there the appellant was forewarned of the allegedly unconstitutional construction of the statute by a previous decision of the highest state court.

IV.

THE ARIZONA SUPREME COURT'S HOLDING OF ESTOPPEL IS NOT AN ADEQUATE STATE GROUND FOR THE JUDGMENT.

Appellees claim the Arizona Supreme Court's decision that appellant was estopped to raise the Federal questions is an adequate state ground for the judgment (M. D. 15-17). When it is urged that a state court decision rests upon a non-Federal ground, this Court will "ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772-73 (1931) (state ground held inadequate was, as here, estoppel). In many cases the Court has held that an "estoppel" holding by a state court is not an adequate state ground when it unreasonably infringes on the protection of Federal rights.[10]

Accordingly, it is of first importance to determine exactly what the Arizona Supreme Court's estoppel holding was. The court said:

> "If appellant is asserting that the self-rating statute as construed by the court is unconstitutional, then

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[10]Thus, in the following cases, the Court ruled that a holding of estoppel by a state court was not an adequate ground for a judgment. In *Abie State Bank* v. *Bryan, supra*, the state court held that a bank which was aided in getting deposits by a bank guaranty law was estopped to challenge the law when, at a later time, all assessments thereunder were going to failed banks. In *Frost* v. *Corporation Commission*, 278 U. S. 515 (1929) the state court decided that the holder of a license to operate a cotton gin, received under one section of a statute which required a showing of public convenience, was estopped to challenge a grant made under another section of the same statute without such a showing. In *New York Central RR* v. *New York & Penn. Co.*, 271 U. S. 124 (1926) the state court held that a carrier waived its right not to repay excess charges without the approval of the ICC by its failure to appeal from a state administrative decision determining the overcharge, but not ordering its return. See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT § 102 at 183-84, § 97 (1951 ed.).

> appellant will not be heard in an attempt to raise such an issue. The rule of law is well established that one who has invoked the provision of a statute, sought to avail himself of its terms, and has been an actor thereunder, may not thereafter question its constitutionality. Haggard v. Industrial Commission, 71 Ariz. 91, 223 P. 2d 915; Stuart v. Norviel, 26 Ariz. 493, 226 P. 908" (J. S. p. 18a).

The Arizona Supreme Court's holding that appellant had "invoked the provisions of a statute" and "sought to avail [itself] . . . of its terms" referred to appellant's contention in the state courts that the Commission was required, under a proper and constitutional construction of A. R. S. § 23-983 (E), the Self-Rating Policy and the Self-Rating Plan, to compute the basic costs contribution of the self-raters in the same manner as that required in the case of general policyholders.[11] This contention was rejected by the Arizona Supreme Court on the merits (J. S. 14-15, 17, 6a, 8a-12a).

In *International Steel & Iron Co.* v. *National Surety Co.*, p. 7 *supra*, this Court passed on the precise question. In rejecting the estoppel defense, the Court said:

> "The respondent insists that as the appellant joined the . . . surety on the refunding bond, as a defendant, it sought to take advantage of the amendatory act of 1929 and is now estopped to question the constitutional validity of the statute . . . . [*Appellant's*] *construction of an act which had not been passed upon by any court was permissible and if, as now appears, the appellant was in error in so construing the act, the mistake cannot be made the basis of an estoppel*. . . . Not until the decision of the Supreme Court was there a holding that the act retroactively affected the enforcibility of the bond. Not until then was there occasion for appellant to urge that, if so construed, the act would impair the obligation of the bond. As we have indicated, the record discloses that

[11] See p. 2 *supra* and p. 14 n. 24 *infra*.

> when this construction of the act appeared probable the appellant promptly raised the constitutional question. *It cannot be estopped so to do by its previous insistence upon a construction which would* render the statute consistent with the Act of 1917 and *present no constitutional difficulty*" (emphasis added) 297 U. S. at 665.

Contrary to appellees' contention (M. D. 16), *International Steel* is not distinguishable on its facts as is evident from the above quotation.

Further, there is no basis for assuming that this Court would have come to a contrary conclusion in *International Steel* if in that case the estoppel issue had been raised and considered in the state court.[12] *International Steel* clearly holds that a party's right to challenge the validity of a state statute under the Federal Constitution would be unreasonably infringed if he were deemed to have waived that right by bringing a suit based on a reasonable and constitutional interpretation of the statute, before it was construed by the state courts.[13]

The Arizona Supreme Court held that appellant, as a general policyholder, was an "actor" under the statute and therefore estopped to attack its constitutionality.[14] If general policyholders are barred from objecting to uncon-

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[12]After rejecting the appellee's estoppel claim in the passage quoted above, the Court pointed out, that the appellee could not rely upon a state law defense not presented in the state courts (citing, at 297 U. S. 666 n. 7, the leading case on this point: *Grayson* v. *Harris*, p. 6 *supra*) without expressly indicating whether it agreed or disagreed with the appellee's assertion that on the facts of the case estoppel could have been an adequate state ground.

[13]In none of the cases cited by appellees at M. D. 15 was a party held estopped to challenge a state statute as construed for the first time in the case before the court on the ground that the suit was brought under the statute, even though the plaintiff argued for a statutory construction which the state courts rejected and which, if adopted, would have rendered the statute constitutional.

[14]Since appellant is a general policyholder it is not an actor under A. R. S. § 23-983(E) which deals only with the authority of the Commission to establish a Self-Rating Plan (J. S. 4, 22, 2a-3a).

stitutional discrimination in favor of self-raters as against general policyholders, then no one can challenge this discrimination.[15] Since the Fund is supported entirely by policyholder premiums (A. R. S. §§ 23-983 (A), 981 (C)), until one becomes a general policyholder he does not have the "injured" or "threatened" "financial interest" that this Court requires a party to have in order to challenge the validity of a state statute under the Federal Constitution. *Doremus* v. *Board of Educ.*, 342 U. S. 429, 435 (1952).[16]

Appellees attempt to avoid the fatal weakness of the Arizona Supreme Court's estoppel holding by contending that the court really intended something entirely different from what it said. Thus they argue that appellant brought its actions on behalf of the Commission and its rights can rise no higher than those of the Commission; and that therefore appellant is estopped to raise the constitutional questions because the Commission would be estopped to raise them (M. D. 16-17). This is not an adequate state ground since, first, the appellant's actions were also brought in behalf of the general policyholders and it is *their* constitutional rights which are being asserted;[17] and, second, appellees' present belated theory of estoppel was never in fact raised, considered, or relied upon in the Arizona courts.[18]

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[15]See cases cited at J. S. 22-23.

[16]Therefore (contrary to appellees assertion, M. D. p. 15), the Arizona Court's estoppel decision does run afoul of the doctrine that Federal law determines "who" may challenge the validity of a state statute under the Federal Constitution. *Allied Stores, Inc.* v. *Bowers*, 358 U. S. 522, 525-26 (1959).

In none of the cases cited by appellees at M. D. 15 did the estoppel doctrine have this effect.

[17]See pp. 4-5 *supra*. The state ground does not therefore meet the requirement that it be "broad" enough to sustain the judgment. *Enterprise Irr. Dist.* v. *Farmers Mut. Canal Co.*, 243 U. S. 157, 164 (1917); *Murdock* v. *Memphis*, 87 U. S. (20 Wall.) 590, 636 (1875); STERN & GRESSMAN, SUPREME COURT PRACTICE 99 (3d ed. 1954).

[18]A state law ground not relied upon by the state supreme court cannot be urged in this Court (authorities cited p. 6 *supra*).

V

THE ARIZONA SUPREME COURT'S HOLDING OF FAILURE TO EXHAUST STATE REMEDIES IS NOT AN ADEQUATE STATE GROUND FOR THE JUDGMENT.

Appellees offer as an adequate state ground for the judgment the holding of the Arizona Supreme Court that:

> "If appellant's constitutional objection is that a statute, even though valid on its face, can be so administered as to be arbitrary and capricious, then the simple answer is that the statute, A. R. S. § 23-946, affords a method for obtaining judicial review of that administrative action. We find nothing unconstitutional in being given a method by which the Commission's orders may be attacked or in being required to pursue that method" (J. S. 18a).

The statutory procedure for judicial review of Commission orders under A. R. S. §23-946[19] cannot possibly give appellant and the general policyholders it represents appropriate relief for the financial losses caused them during 1948-53 by unconstitutional discrimination in favor of the self-raters. An appellant in this Court may not be forced to exhaust a state procedure which is futile, or doubtfully adequate, before its constitutional claims will be heard. *Montana Nat'l Bank* v. *Yellowstone County*, 276 U. S. 499, 505 (1928); *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 624-26 (1946).

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[19] A. R. S. §23-946 provides that a party dissatisfied with a Commission order may commence an action in the Superior Court "to set aside, vacate or amend the order, on the ground that the order is unreasonable or unlawful," after the party has petitioned the Commission, under A. R. S. § 23-945, for a hearing on the reasonableness and lawfulness of the order, "and in such petition has raised every issue in the action." A. R. S. § 23-948 provides for an appeal to the Arizona Supreme Court from the Superior Court decision. A. R. S. §§ 23-945 to 948 are set forth in full in M. D. 1a-4a.

A. R. S. § 23-946 limits the jurisdiction of the Superior Court on review of a Commission order to directing that the order be set aside, vacated or amended.[20] The Superior Court in such a proceeding cannot render judgment against the Commission for premiums discriminatorily exacted from the general policyholders or judgment against the self-raters for the amount by which they have been unjustly enriched by the discrimination.[21] In view of this strictly limited power of the Superior Court upon review of a Commission order, appellant and the other general policyholders cannot obtain by resort to the statutory procedure an adequate remedy for the wrong of which they complain.[22]

Even though the estoppel holding of the Arizona Supreme Court is not a state ground adequate to bar the jurisdiction of this Court (see pp. 8-11 *supra*), that holding would be conclusive upon, and would prevent, the Arizona Superior Court from considering appellant's Federal constitutional challenges, if raised in a proceeding under A. R. S. § 23-946. Moreover, the Commission lacks jurisdiction to declare that A. R. S. § 23-983(E), a statute which it is required to administer, is, as construed by the state supreme court and applied by the Commission, invalid

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[20] J.S. 16a, 32a-33a.

[21] The Arizona Supreme Court ruled in its rehearing opinion that the self-raters are not even proper parties to appellant's appeal from the Commission decision under A. R. S. § 23-946 (J.S. 16a).

[22] Appellees try to bolster the adequacy of the procedure under A. R. S. §§ 23-945 and 946 by pointing out that if new rates were set for the self-raters in such a proceeding the Commission could bring a new action against the self-raters to collect them (M. D. 19). In the first place, it is probable that such action would fail, because of res judicata and because, according to appellees, the Commission would be estopped to bring it (J.S. 24-25; M. D. 16-17). Where the existence of the state remedy is uncertain a party need not pursue it before seeking Federal relief. *Township of Hillsborough* v. *Cromwell*, p. 12 *supra*. Moreover, it can hardly be asserted that the A. R. S. §§ 23-945 and 946 procedure is "adequate" if another proceeding is necessary to obtain relief for the violation of rights declared therein.

under the Federal Constitution.[23] Therefore, appellant could not obtain a decision of its constitutional claims in the review proceeding even if there had been no estoppel holding (A. R. S. § 23-946(C)). Thus, in view of the fact that the Arizona Supreme Court rejected on the merits all state law arguments which could have avoided the Federal constitutional issues now raised,[24] the review procedure of A. R. S. § 23-946 does not afford an adequate remedy. *Public Utilities Commission* v. *United States*, 355 U. S. 534, 538-40 (1958); *Montana Nat'l Bank* v. *Yellowstone County*, p. 12 *supra*.

Assuming for purposes of argument that the judicial review procedure could give appellant appropriate and adequate relief, the fact is that appellant has sought to avail itself of that procedure without success. Appellant's first action was based entirely on the discriminatory practices of the Commission favoring self-raters over general policyholders in charging for basic costs during 1948-53. In dismissing this action because of appellant's failure to exhaust its administrative remedy under A. R. S. § 23-945, the Superior Court said:

> "If the ultimate substantive statements of fact and law as set forth in plaintiff's amended complaint be true, appropriate action should be taken to remedy

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[23] See, e.g., *Pressley* v. *Industrial Commission*, 73 Ariz. 22, 31-32, 236 P. 2d 1011, 1017-18 (1951) (Commission has no adjudicatory power beyond that conferred by Workmen's Compensation Act [of which A. R. S. § 23-983(E) is a part] and the provision of the Arizona Constitution authorizing said Act); *West Chandler Farms Co.* v. *Industrial Commission*, 64 Ariz. 383, 392, 173 P. 2d 84, 90 (1946) (". . . . [C]ommission is bound by terms of the compensation law . . . ."); *Industrial Commission* v. *Arizona Power Co.*, p. 7 *supra* at 439, 295 Pac. at 310 ("the commission . . . must proceed and act according to legislative authority as expressed or necessarily implied").

[24] See J. S. 6a, 8a-12a, 14a-15a; Appellant's Statement of Position in the Superior Court in the second action (363-65, 369-72, 377) and Appellant's Brief in the Arizona Supreme Court 16-17, 27-33 (urging the court not to construe the Self-Rating Statute, Plan and Policy so as to sanction the unreasonable and unconstitutional discrimination in favor of the self-raters during 1948-53).

> the situation. In this connection this court takes judicial notice of the fact that plaintiff has filed a verified petition and has been granted a hearing date by the Commission. At that time the substantive charges made by plaintiff should be carefully considered and any necessary corrective measures should be taken" (J. S. 29a-30a).

Appellant then proceeded on its pending petition before the Commission which was based largely on the 1948-53 period (73-75, 96-126, 128-30, 139; J. S. 16 n. 25). The Commission denied relief as to 1948-53 but modified its 1954 rate order (250-53).[25] The fourth cause of action of appellant's second suit sought, among other things, judicial review of the Commission decision (264-69; J. S. 36a). On a motion to dismiss by the self-raters, the Superior Court in its decision limited judicial review to the Commission's 1954 order, and that review is now pending (J. S. 36a). Thus, the appellant is precluded from relief in regard to the crucial 1948-53 period in the pending review proceeding. Having availed itself of the A. R. S. § 23-946 procedure once and been denied a hearing, appellant is not required to resort again to the same procedure before seeking Federal relief. *Smith* v. *Illinois Bell Tele. Co.*, 270 U. S. 587, 590-91 (1926).

Appellees argue that appellant cannot obtain judicial review in regard to the 1948-53 rates because the Superior Court held that appellant's attempt to seek a review under A. R. S. § 23-945 as to those years was not timely, and that this holding was at least impliedly affirmed by the Arizona

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[25] Nowhere in the Commission's findings of fact, conclusions of law or decision is there any indication that appellant was denied relief in regard to 1948-53 because of any statute of limitations or laches. All the Commission's findings and conclusions deal solely with the merits (209-49) and most apply to 1948-53 as well as to later years. See Findings of Fact 1 at 227; 2 at 228; 3 at 231-36; 4 at 236; 5 at 237; 6 at 237-38; 7 at 238-39; 12 at 241-42; 15 at 245; Conclusions of Law 1 at 245; 5 at 247; 7 at 248; 8 at 248-49; 10 at 249; 11 at 249.

Supreme Court (M. D. 18-19). With respect to the judicial review proceeding, it cannot be contended that appellant did not proceed in due time since it commenced that proceeding thirteen days after the Commission decision (209, 255).

Assuming that appellant's proceeding before the Commission under A. R. S. § 23-945 was barred in regard to the 1948-53 period because of untimeliness, that ground is not an adequate basis for the judgment because appellant "could not fairly be deemed to have been apprised of its existence." *NAACP* v. *Alabama ex rel Patterson*, 357 U. S. 449, 457-58 (1958). There is no statutory time limit on a proceeding under A. R. S. § 23-945. Nor has any time limit been judicially imposed, at least prior to the instant case.[26]

When it became apparent that the formula pursuant to which the Commission was charging the self-raters for basic costs was working to the serious disadvantage of the general policyholders, appellant commenced an action with due diligence (4-5; J. S. 9-11). See *Ancient Egyptian Arabic Order* v. *Michaux*, 279 U. S. 737 (1929), where the Court found

[26]In their Arizona Supreme Court brief, the self-raters conceded that there is no specific statutory or judicial time limit applicable to an A. R. S. § 23-945 proceeding (p. 27). The only Arizona authorities appellees cited were quotations from *O'Neill* v. *Industrial Furnaces, Inc.*, 72 Ariz. 149, 150-51, 231 P. 2d 768, 769-70 (1951) and *Holmes* v. *Osborn*, 57 Ariz. 522, 550, 115 P. 2d 775, 787 (1941) (Br. pp. 27-28). In neither of these cases was timeliness an issue. The *Holmes* opinion does not even imply that there is a time limit on filing a petition under A. R. S. § 23-945. In *O'Neill* the court stated that an action for judicial review had been "timely" commenced under what is now A. R. S. § 23-946. In the first place, this dictum did not even extend to the filing of a petition under A. R. S. § 23-945. Moreover, use of the word "timely" in regard to A. R. S. § 23-945, seems to have been overruled by *Industrial Commission* v. *J. & J. Const. Co.*, 72 Ariz. 139, 148-49, 231 P. 2d 762, 768 (1951). The first decision in that case stated that since no "timely" direct attack was made on a Commission order under what is now A. R. S. § 23-946, the order became res judicata. On rehearing, the court modified its opinion to delete the word "timely" and merely state that since the defendant had not directly attacked the order under A. R. S. § 23-945, it was presumed lawful in the proceeding before the court.

that a state court holding in regard to laches was wholly unsupported by the evidence and therefore not an adequate state ground.

CONCLUSION

Appellant's complaints below allege facts showing that during 1948 to 1953 the Commission unreasonably discriminated against the class of general policyholders in favor of thirty-four self-raters and that this discrimination was substantial and unjustified. These facts must be deemed to be true on this appeal (J. S. 5). The Arizona Supreme Court stated that under the constitution, statutes and law of the state, the complaints failed to state a claim upon which relief could be granted, but refused to consider on rehearing whether, in view of the facts alleged in the complaints, its construction and the Commission's application of the statute violated the Federal Constitution (J. S. 6a, 8a-12a, 14a-15a, 17a-18a). The grounds for such refusal are clearly inadequate under controlling decisions of this Court, since they unreasonably preclude the protection of Federal constitutional guarantees. Accordingly, the motion to dismiss should be denied and probable jurisdiction of this appeal should be noted.

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